Supreme Court, U.S.
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No. 99-991502

In The Supreme Court of the United States

AMOCO PRODUCTION COMPANY,
Petitioner,
v.
LOBO EXPLORATION COMPANY,
Respondent.

Petition for a Writ of Certiorari to the Court of Civil Appeals of the State of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it violates the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause when a court, contrary to the rule in other jurisdictions, certifies a nationwide class action alleging numerous state-law causes of action without proof by the proponent of certification that conflicts in state laws will not destroy the predominance of common issues and render the class action hopelessly unmanageable.

LIST OF PARTIES AND AFFILIATES

There are no named parties other than those stated in the caption. In the case on review, the district court certified a class action with the following plaintiff class:

> All persons or entities who own or owned an interest in any drilling and spacing unit, secondary recovery unit, or other enhanced recovery unit or property, or in oil and gas wells wherein Amoco was or is the operator, and where Amoco (a) used allocation accounts, sometimes referred to as "functional location accountability codes" ("FLACS") and/or "Operating Centers" to bill and collect indirect charges and/or (b) billed and collected charges for the services of supervisors above first line supervision.
>
> Specifically excluded from the class are: (a) any and all Amoco offshore operated properties; (b) any forced pooled working interest, unless the force pooled working interest owner entered into a joint operating agreement that superseded the pooling order; (c) all claims for improper billing of charges prior to January 1, 1983; (d) all agencies, departments or instrumentalities of the United States of America; and (e) Conoco Inc. and other persons or entities whom Plaintiff's counsel is prohibited from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct.

Lobo Exploration Co. v. *Amoco Production Co.*, 991 P.2d 1048, 1049-50 (Okla. Ct. App. 1999) (Pet. App. 2a) (internal quotation marks omitted), *cert. denied*, No. 91,757 (Okla. Nov. 10, 1999).

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Amoco Production Company declares that its parent company is BP Amoco Company (whose parents are BP Amoco Corporation and BP Amoco p.l.c.), and that it has the following subsidiaries that are not wholly owned:

Amoco Arabia Company
Amoco Brasil Energia LTDA
Amoco Caspian Sea Finance Limited
Amoco Caspian Sea Petroleum Limited
Azerbaijan International Operating Company
Amoco North Absheron Petroleum Limited
North Absheron Operating Company Limited
Altura Energy LLC
Altura Energy Ltd.
Amoco Egypt East Delta Marine Corporation
Nile Delta Oil Company
Ekma Oil Company
Gulf of Suez Petroleum Company
North October Petroleum Company
Rudeis Oil Company
Torsina Oil Company
Amoco Eritrea Petroleum Company
Amoco U.K. Petroleum Limited
Amoco (Fiddich) Limited
Amoco (U.K.) Pension Trust Limited
Amoco (U.K.) Holdings Limited
Amoco International Gas Development Limited
Amoco Services Limited
Amoco Teesside Gas Limited
BP-Amoco Global Power (Europe) Limited
Great Yarmouth Power Limited
Energia del Sur S.A.
TERMAP S.A.

Trinidad Tobago Development Finance Company Limited
Amoco Italy Petroleum Company-Societa Per Azioni
Caspian Pipeline Ventures L.L.C.
Kazakstan Pipeline Ventures
Natural Gas Vehicles Company
Amoco Bolivia Oil and Gas Aktiebolag
Amoco Empresa Petrolera Chaco S.A.
East Tanka Petroleum Company
Amoco Trinidad Gas B.V.
TEPCO, LLC
Atlantic LNG Company of Trinidad and Tobago
AIMSA S.A.de C.V.
Power Generation Company of Trinidad and Tobago
Crescendo Management L.L.C.
Crescendo Resources, L.P.
Amoco Power Resources Holding I Ltd.
Amoco Power Resources Holding II LTD.
Bahia de Bizkaia Electridad, S.L.
Bahia de Bizkaja Gas, S.L.
East Texas Salt Water Disposal Company
Floyd Oil Ltd.
Gravcap, Inc.
Heat Transfer Research, Incorporated
Sultran Ltd.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND AFFILIATES	ii
RULE 29.6 STATEMENT	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	8
I. FAILURE TO REQUIRE THAT PROPONENTS OF NATIONWIDE CLASS ACTIONS DEMONSTRATE THE ABSENCE OF CONFLICTS OF LAWS PRIOR TO CERTIFICATION DENIES DUE PROCESS OF LAW AND FULL FAITH AND CREDIT	8
II. AN ORDER CERTIFYING A NATIONWIDE CLASS ACTION IN A MANNER THAT DENIES DUE PROCESS IS REVIEWABLE BY THIS COURT	17
CONCLUSION	21

TABLE OF AUTHORITIES

CASES	Page
Allgood v. *R.J. Reynolds Tobacco Co.*, 80 F.3d 168 (5th Cir. 1996)	14
Allstate Ins. Co. v. *Hague*, 449 U.S. 302 (1981)	13
Amchem Prods., Inc. v. *Windsor*, 521 U.S. 591 (1997)	10
American Export Lines, Inc. v. *Alvez*, 446 U.S. 274 (1980)	19
In re American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996)	11
Andrews v. *American Tel. & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996)	11
Blair v. *Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999)	18
Brady v. *Maryland*, 373 U.S. 83 (1963)	19
Bullington v. *Missouri*, 451 U.S. 430 (1981)	20
Burroughs v. *Jackson Nat'l Life Ins. Co.*, 618 So. 2d 1329 (Ala. 1993)	14
Calder v. *Jones*, 465 U.S. 783 (1984)	20
Carroll v. *Cellco Partnership*, 713 A.2d 509 (N.J. Super. Ct. App. Div. 1998)	12
Castano v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996)	10, 11, 18
Chin v. *Chrysler Corp.*, 182 F.R.D. 448 (D.N.J. 1998)	12
Citicorp Acceptance Co. v. *McIlwain*, 715 So. 2d 199 (Ala. 1997)	12
Cohen v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)	18
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978)	20, 21
Cox Broad. Corp. v. *Cohn*, 420 U.S. 469 (1975)	19, 20
Dodd v. *Nelda Stephenson Chevrolet, Inc.*, 626 So. 2d 1288 (Ala. 1993)	14
Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974)	18
English v. *Fischer*, 660 S.W.2d 521 (Tex. 1983)	15
In re Ford Motor Co. Bronco II Prod. Liab. Litig., 177 F.R.D. 360 (E.D. La. 1997)	12

TABLE OF AUTHORITIES—Continued

	Page
In re Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332 (D.N.J. 1997)	12
Ford Motor Credit Co. v. *Suburban Ford*, 699 P.2d 992 (Kan. 1985)	15
General Tel. Co. v. *Falcon*, 457 U.S. 147 (1982)	10
Georgine v. *Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997)	11
Gillette Co. v. *Miner*, 459 U.S. 86 (1982)	19
Haas v. *Montgomery Ward and Co.*, 812 F.2d 1015 (6th Cir. 1987)	15
Harris v. *Washington*, 404 U.S. 55 (1971)	20
Herbst v. *International Tel. & Tel. Corp.*, 495 F.2d 1308 (2d Cir. 1974)	17
Hudson Distribs., Inc. v. *Eli Lilly & Co.*, 377 U.S. 386 (1964)	19
Isler v. *Texas Oil & Gas Corp.*, 749 F.2d 22 (10th Cir. 1984)	15
In re Jackson Nat'l Life Ins. Co. Premium Litig., 183 F.R.D. 217 (W.D. Mich. 1998)	11
Jefferson v. *City of Tarrant*, 522 U.S. 75 (1997)	19
Kennedy Elec. Co. v. *Moore-Handley, Inc.*, 437 So. 2d 76 (Ala. 1983)	14
In re Kirschner Med. Corp. Sec. Litig., 139 F.R.D. 74 (D. Md. 1991)	8, 12
Local No. 438 Constr. & Gen. Laborers' Union v. *Curry*, 371 U.S. 542 (1963)	19
National Socialist Party of Am. v. *Village of Skokie*, 432 U.S. 43 (1977)	19
Parkinson v. *April Indus., Inc.*, 520 F.2d 650 (2d Cir. 1975)	17
Parks v. *Morris Homes Corp.*, 141 S.E.2d 129 (S.C. 1965)	14
Pennsylvania v. *Ritchie*, 480 U.S. 39 (1987)	20
Peterson v. *Dougherty Dawkins, Inc.*, 583 N.W.2d 626 (N.D. 1998)	12
Phillips Petroleum v. *Shutts*, 472 U.S. 797 (1985)	7, 9, 10, 13, 14
Purcell & Wardrope, Chartered v. *Hertz Corp.*, 664 N.E.2d 166 (Ill. App. Ct. 1996)	13

TABLE OF AUTHORITIES—Continued

	Page
In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995)	18
Shaffer v. *Heitner*, 433 U.S. 186 (1977)	20
Southland Corp. v. *Keating*, 465 U.S. 1 (1984)	20
Sugarhouse Fin. Co. v. *Anderson*, 610 P.2d 1369 (Utah 1980)	14
Walsh v. *Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986)	11
Williams v. *Khalaf*, 802 S.W.2d 651 (Tex. 1990)	15
CONSTITUTION	
U.S. Const. art. IV, § 1	2
amend. XIV, § 1	2
FEDERAL RULE	
Fed. R. Civ. P. 23(f)	21
STATE STATUTES	
Ala. Code § 6-2-3 (1997)	15
§ 6-2-34 (1997)	15
Alaska Stat. § 09.10.053 (1997)	15
§ 09.10.070 (1997)	15
§ 45.50.561 (1997)	16
Colo. Rev. Stat. § 13-80-101 (1997)	15
Kan. Stat. Ann. § 50-624 (1996)	16
§ 60-511 (1997)	15
§ 60-513 (1997)	15
La. Rev. Stat. Ann. § 51:1402 (1997)	16
Mich. Comp. Laws § 600.5807 (1997)	15
§ 600.5813 (1997)	15
Mont. Code Ann. § 27-2-202 (1997)	15
§ 27-2-203 (1997)	15
§ 30-14-1102 (1997)	16
N.M. Stat. Ann. § 37-1-3 (1997)	15
§ 37-1-4 (1997)	15
Okla. Stat. Ann. tit. 12, § 95 (1997)	15
tit. 12, § 993(A)(6)	17, 21
Tex. Bus. & Comm. Code Ann. § 17.45 (1997)	16

TABLE OF AUTHORITIES—Continued

	Page
Tex. Civ. Prac. & Rem. Code Ann. § 16.004 (1997)	15
Utah Code Ann. § 13-11-3 (1997)	16
§ 78-12-23 (1997)	15
§ 78-12-26 (1997)	15
Wyo. Stat. Ann. § 1-3-105 (1997)	15
§ 40-12-102 (1997)	16

SCHOLARLY AUTHORITIES

Henry J. Friendly, *Federal Jurisdiction: A General View* (1973)	18
Joseph Grundfest, *Disimplying Private Rights of Action under the Federal Securities Laws: The Commission's Authority*, 107 Harv. L. Rev. 963 (1994)	18
Jordon L. Kruse, Comment, *Appealability of Class Certification Orders: The 'Mandamus Appeal' and a Proposal to Amend Rule 23*, 91 Nw. U. L. Rev. 704 (1997)	18
Peter H. Schuck, *Mass Tortes: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941 (1995)	18
William Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1972)	18
15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.19 (2d ed. 1992)	18

IN THE

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No. 99-

AMOCO PRODUCTION COMPANY,
Petitioner,

v.

LOBO EXPLORATION COMPANY,
Respondent.

Petition for a Writ of Certiorari to the Court of Civil Appeals of the State of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

Petitioner Amoco Production Company ("Amoco") respectfully petitions for a writ of certiorari to review the judgment of the Court of Civil Appeals of the State of Oklahoma.

OPINIONS BELOW

The opinion of the Oklahoma Court of Civil Appeals in *Lobo Exploration Company* v. *Amoco Production Company*, is reported at 991 P.2d 1048 (Okla. Ct. App. 1999) (Pet. App. 1a-15a), *cert. denied*, No. 91,757 (Okla. Nov. 10, 1999) (Pet. App. 57a).

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1999, and the order of the Oklahoma Supreme Court denying certiorari was entered on November 10,

1999. This Court has jurisdiction under 28 U.S.C. § 1257(a). On January 19, 2000, Amoco filed an application with the Honorable Stephen G. Breyer as Circuit Justice for an extension of time to petition this Court for a writ of certiorari. On January 21, 2000, the Chief Justice, to whom the application was referred, granted the extension up to and including March 9, 2000.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions involved in this petition are the Full Faith and Credit and Due Process Clauses of the United States Constitution. The Full Faith and Credit Clause requires: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. The Due Process Clause reads, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This case presents a significant issue arising out of the failure of the courts below to engage in a choice-of-law analysis before certifying a nationwide class action in a state court proceeding. Respondent Lobo Exploration Company ("Lobo") filed a complaint against Amoco in Oklahoma state court alleging numerous state-law causes of action arising from accounting and billing practices used by Amoco with respect to approximately 26,000 domestic, on-shore oil and gas wells that it has operated. Lobo then moved to certify a nationwide class action on behalf of owners of non-operating, working interests in these wells ("Working-Interest Owners"). Although the billing practices at issue are governed by approximately 7,000 joint operating agreements covering wells operated in 18 states, which expressly select the laws of many

different states, the Oklahoma trial court, without conducting the requisite choice-of-law analysis, certified a class of startling breadth, declaring that it would be fair to apply Oklahoma law to all the claims of this class. See Pet. App. 54a-55a. This unreasoned certification, affirmed on appeal, violated the Due Process and Full Faith and Credit Clauses of the Constitution by excusing respondent, as the proponent of class certification, from responsibility for establishing that there were no conflicts of laws that would destroy the predominance of common issues and make the class action unmanageable. Certifications of this kind create an enormous pressure to settle, regardless of the merits of the underlying dispute, which generally force defendants to forfeit their day in court in a manner that is fundamentally unfair.

Approximately 2,700 Working-Interest Owners, located in 48 states, have participated in wells operated by Amoco in 18 states including Texas, Oklahoma, Wyoming, Colorado, New Mexico, Kansas, Alabama, Arkansas, Michigan, Alaska, Utah, and Montana. More than half of these Working-Interest Owners reside outside of Oklahoma. These Working-Interest Owners range from small, independent companies such as Lobo, which owns a non-operating working interest in a couple of wells operated by Amoco in Oklahoma, to companies that are themselves large, sophisticated operators, such as Exxon, Mobil, Chevron, and Texaco. A number of the major Working-Interest Owners in Amoco-operated wells engage in the same accounting practices at issue here. Indeed, the American Petroleum Institute, an organization comprised of the largest domestic oil and gas producers, opposed on appeal the certification of the class in which many such producers are putative members.

In its role as Operator of the wells, Amoco routinely incurs expenses for drilling, completing, and operating

the wells, and is entitled to recover proportional shares of the expenses from the Working-Interest Owners. In accounting for these expenses, Amoco uses allocation accounts, sometimes referred to as "functional location accountability codes" ("FLACS") and/or "Operating Centers."

These billing practices are governed by the approximately 7,000 joint operating agreements. Many of these contracts were formed outside of Oklahoma and contain express choice-of-law provisions that provide that the laws of specific states other than Oklahoma shall govern any dispute between the parties. These joint operating agreements include express provisions addressing certain expense items which are billed to the Working-Interest Owners. Given the wide range in bargaining power among the Working-Interest Owners, the agreements are sometimes much more specific on the treatment of joint expense items and frequently include special provisions, attachments or exhibits, which address the treatment of joint interest expenses. Moreover, Amoco makes use of certain bulletins and interpretations issued by the Council of Petroleum Accountants Societies (COPAS) that provide further guidance and articulation of industry standards with respect to certain joint interest billing issues.

The manner in which these joint expenses are billed also has varied. Under many of the joint operating agreements, Amoco provides Working-Interest Owners a monthly summary or "short form" billing statement. Many of the myriad joint operating agreements, however, provide for optional paragraphs that require a longer, detailed monthly billing statement. Most of the parties with the option of electing longer, more detailed monthly billing, however, also elect to receive the short, summary form of billing. Many, but not all, of the joint operating agreements also provide that the joint interest billings from Amoco are presumed correct after the passage of a speci-

fied number of months or years (often 24 months), unless a written exception and claim for an adjustment are made with the Operator.

Pursuant to their individual contracts, Working-Interest Owners also have rights to conduct periodic audits with respect to their monthly billings. Although larger Working-Interest Owners often conduct independent audits, it is also common for groups of smaller Working-Interest Owners in wells with the same Operator to combine together and jointly hire auditors. Since 1990, Working-Interest Owners have participated in more than 250 audits. Most, if not all of these audits, involved multiple Working-Interest Owners. Indeed, Amoco has full-time employees expressly assigned to assist these outside audits by Working-Interest Owners. During these audits, Amoco has made full and express disclosure of the accounting practices in question and has consistently provided complete access to accounting information supporting its monthly charges as requested. As a result of these audits, some of the Working-Interest Owners protested the precise practices at issue, which resulted in written responses from Amoco explaining the accounting reasons that support them. Accordingly, several Working-Interest Owners entered into settlements and releases regarding the charges about which Lobo complains. Indeed, the large, sophisticated Working-Interest Owners who pay the great majority of the total joint-interest billings knew of the allegedly "hidden" charges because of, among other things, these audits.

In 1996, Lobo hired an auditor to review Amoco's charges with respect to a well in Woodward County, Oklahoma. Lobo's auditor made several broad, generic objections to Amoco practices. As a result of this dispute, Lobo sued Amoco in the District Court of Beaver County, Oklahoma, alleging that Amoco double-billed certain costs associated with oil and gas wells that Amoco oper-

ated and in which Lobo owned a working interest. Lobo asserted multiple theories of liability including breach of contract, fraud, deceit, unjust enrichment, tortious and bad-faith breach of contract, and violation of Oklahoma's Consumer Protection Act.

Lobo then moved for a nationwide class action against Amoco, and the District Court conducted a seven-day evidentiary hearing. Lobo presented no analysis of possible conflicts of laws, asserting only that Oklahoma law should apply to all putative claims of all the class members. Although it did not have the burden to demonstrate lack of predominance or unmanageable disparities in state law that would defeat certification, Amoco introduced extensive documentary evidence, DX 52, which specifically reviewed the laws of several of the numerous States implicated and demonstrated conflicts of laws with respect to variations in the substantive law of fraud, tortious breach of contract laws, statutes of limitations, tolling of statutes of limitation, and the availability of state statutory consumer protection claims. Nevertheless, on July 16, 1998, the District Court certified a class consisting of:

> All persons or entities who own or owned an interest in any drilling and spacing unit, secondary recovery unit, or other enhanced recovery unit or property, or in oil and gas wells wherein Amoco was or is the operator, and where Amoco (a) used allocation accounts, sometimes referred to as "functional location accountability codes" ("FLACS") and/or "Operating Centers" to bill and collect indirect charges and/or (b) billed and collected charges for the services of supervisors above first line supervision.[1]

Pet. App. 55a.

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1 "Specifically excluded from the class are: (a) any and all Amoco offshore operated properties; (b) any forced pooled working interest, unless the forced pooled working interest owner entered into a

In certifying the class, the District Court cited this Court's decision in *Phillips Petroleum* v. *Shutts*, 472 U.S. 797 (1985), for the proposition that "Oklahoma is not precluded from applying its own law in a class action so long as it has a 'significant contact or aggregation of contacts' to the claims asserted by each member of the plaintiff class such that application of the forum law is not arbitrary or unfair." Pet. App. 51a. The Court failed to conduct any analysis of the contacts of the absent class members that would justify application of Oklahoma law to their claims with the exception of noting that "[a]ny class member who does not want its claims determined under Oklahoma law or determined as part of the class can easily opt out of the class after receipt of notice." *Id.* at 52a. After briefly discussing authorities dealing with the notice required to absent class members, the Court summarily concluded, that "[t]he Court finds that the nationwide class sought to be certified in this case does not violate fundamental principles of due process or exceed the jurisdictional bounds of the Court as asserted by Amoco." *Id.* at 54a. The Court then concluded with a finding that:

> Amoco has failed to show an actual conflict of law that has a material effect on this action. It is the defendants' burden to demonstrate the existence of a true conflict of law. *Lewis v. The Sac and Fox Tribe of Oklahoma Housing Authority*, 896 P.2d 503 (Okla. 1994), *cert. denied*, 116 S.Ct. 476, 512 (1995) ("One who asserts that the law different

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joint operating agreement that superseded the pooling order; (c) all claims for improper billing of charges prior to January 1, 1983; (d) all agencies, departments or instrumentalities of the United States of America; and (e) Conoco Inc. and other persons or entities whom Plaintiff's counsel is prohibited from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct." Pet. App. 55a-56a.

> from that of Oklahoma governs the dispute bears the burden of identifying and invoking that other law.") Moreover, at the certification stage it is improper to decide which law applies. *Weatherly v. Deloitte & Touche*, 905 S.W. 2d 642 (Tx. App. 1995) and *In re Lilco Securities Litigation*, 111 F.R.D. 663 (E.D. N.Y. 1986).

Id. at 54a-55a.

Amoco appealed pursuant to Okla. Stat. Ann. tit. 12, § 993(A)(6), which considers certification of a class to be an immediately appealable order. On May 28, 1999, the Oklahoma Court of Civil Appeals affirmed the certification. The Court opined that *Shutts* does not require resolution of conflicts of laws questions prior to certification and that the trial court could make a final determination at the merits stage. See Pet. App. 7a. Based primarily on *In re Kirschner Medical Corp. Securities Litigation*, 139 F.R.D. 74, 83 (D. Md. 1991), it concluded that only a "minority view" of courts require a threshold of determination of conflicts of laws questions in the class certification context. Pet. App. 7a.

Amoco filed a Petition for Rehearing on June 17, 1999. The Court of Appeals denied rehearing by order of July 2, 1999. Amoco then filed a petition to the Oklahoma Supreme Court for a writ of certiorari, which was denied without comment on November 10, 1999.

REASONS FOR GRANTING THE PETITION

I. FAILURE TO REQUIRE THAT PROPONENTS OF NATIONWIDE CLASS ACTIONS DEMONSTRATE THE ABSENCE OF CONFLICTS OF LAWS PRIOR TO CERTIFICATION DENIES DUE PROCESS OF LAW AND FULL FAITH AND CREDIT.

The Oklahoma Court's holding that defendants bear the burden of demonstrating the presence of conflicts of laws at the certification stage violates due process, fails to

afford full faith and credit to the laws of other States and widens a split in lower court authorities. This Court's decision in *Phillips Petroleum* v. *Shutts*, 472 U.S. 797, 818-23 (1985), made clear that due process demands an individualized consideration of choice-of-law issues that is not overridden for convenience of case administration. Although several courts have steadfastly followed the guidance in *Shutts*, Oklahoma and several other jurisdictions have relieved the plaintiff of the burden of demonstrating that variations in state law will not predominate and make a class action unsuitable or have delayed consideration of the choice-of-law issues until after certification. The result is the certification of classes of enormous breadth that are governed without reference to normal principles of choice of law, even when the parties have expressly agreed to be governed by the law of a specific jurisdiction.

In *Shutts* this Court made clear that it was a violation of Due Process and the Full Faith and Credit Clause for a state to apply its law unless it has " 'significant contact or aggregation of contacts' " to the claims asserted by each member of the plaintiff class. 472 U.S. at 818. In *Shutts*, a group of royalty owners brought a class action to recover interest on royalties held pending regulatory approval of prices. The 28,100 class members lived in all 50 states and several foreign jurisdictions and had leases in eleven states. See *id.* at 799, 801. This Court held that both the Due Process and Full Faith and Credit Clauses of the Constitution require that " 'for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.' " *Id.* at 818. This Court then examined the contacts between the causes of action and the law of the forum jurisdiction to assure that due process

rights were being respected, cautioning that courts should not merely bootstrap an analysis of jurisdictional contacts into a choice-of-law analysis.[2] See *id.* at 819-21. As this Court noted, the determination of the constitutional limitations on the choice of law "is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection to the forum." *Id.* at 821.

Trial courts play a vital gatekeeping function in conducting the rigorous analysis of the class certification requirements before certifying a class. These courts should certify a wide-ranging class only when the proponent of the class has borne the burden of demonstrating all of the prerequisites to certification. See, *e.g.*, *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 161 (1982); *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996). In *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997), this Court recently re-emphasized the central importance that choice-of-law analysis plays in ensuring due process *during* the certification process. In *Amchem*, the variations in state law were indeed so significant as to indicate that the claims were not predominant and the class action vehicle not superior, rendering the class unfair and unmanageable. *Id.* at 624. In *Amchem*, this Court accordingly affirmed the Third Circuit's decertification of a settlement class for several reasons including, specifically, because the trial court failed to "apply an

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2 "[A] chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs." *Phillips Petroleum* v. *Shutts*, 472 U.S. 797, 807 (1985) (citing *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). The defendants had standing to raise these rights because the failure to consider the issue could leave the judgment constitutionally defective, devoid of res judicata, and not entitled to full faith and credit. *See id.* at 805.

individualized choice of law analysis to each plaintiff's claims." *Georgine* v. *Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997).

Although this Court has yet to speak directly to the issue, numerous lower courts have concluded that, following *Shutts*, "[a] district court's duty to determine whether the plaintiff has borne its burden on class certification requires that a court consider variations in state law when a class action involves multiple jurisdictions." *Castano*, 84 F.3d at 741. "Prior to certification, the district court must determine whether variations in state law defeat predominance." *Id.* at 750. Likewise, the D.C. Circuit has recognized that in order "to establish commonality of the applicable law, nationwide class action movants must credibly demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles.'" *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986) (Ginsburg, J.) (quoting *In re Asbestos School Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986)); see also *Andrews* v. *American Tel. & Tel. Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996) (decertifying class because of issues "compounded by the necessity of referencing fifty sets of . . . consumer protection laws"); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (reversing certification of nationwide class for failure of district court to consider variation in laws and the reality that "[i]f more than a few of the laws of the fifty states differ, the district court would face an impossible task of instructing a jury on the relevant law").[3]

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[3] *See also In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 222-23 (W.D. Mich. 1998) ("In addressing the certification question, the Court is required to determine whether variations in state law defeat predominance. . . . Indeed, the choice-of-law analysis is a matter of due process and is not to be altered

The Oklahoma Court of Civil Appeals rejected this line of cases when it refused to require that proponents of certification demonstrate that conflicts of state laws do not destroy the predominance of common issues or render the class unmanageable. Pet. App. 6a-7a. In so doing, the Oklahoma court recognized the split of authority on the question. See *id.*; cf. *In re Kirschner Med. Corp. Sec. Litig.*, 139 F.R.D. 74, 84 (D. Md. 1991) (considering it "inappropriate to decide choice of law incident to a motion for class certification") (citing *Seidman* v. *Stauffer Chem. Corp.*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,868, at 94,236 (D. Conn. 1986); *In re Lilco Sec. Litig.*, 111 F.R.D. 663, 670 (E.D.N.Y. 1986); *In re Pizza Time Theatre Sec. Litig.*, 112 F.R.D. 15, 18 (N.D. Cal. 1986)); see also *Peterson* v. *Dougherty Dawkins, Inc.*, 583 N.W.2d 626, 629-31 (N.D. 1998) (certifying class under North Dakota law).

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in a nationwide class action simply because it may otherwise result in procedural and management difficulties." (citations omitted)); *Chin* v. *Chrysler Corp.*, 182 F.R.D. 448, 457 (D.N.J. 1998) (rejecting certification of a nationwide class because of the need to apply the law of 50 jurisdictions; "[I]n nationwide class actions, choice of law constraints are constitutionally mandated. The parties before this Court have a due process right to have their claims governed by the state law applicable to their dispute." (citation omitted)); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 371-72 (E.D. La. 1997) (relying on *Shutts* and refusing to certify class because of implication of laws of 51 different jurisdictions); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 347-48 (D.N.J. 1997) (denying certification of a nationwide class because of variations in states' laws; "due process requires individual consideration of the choice of law issues raised by each class member's case before certification"); *Citicorp Acceptance Co.* v. *McIlwain*, 715 So. 2d 199, 204 (Ala. 1997) (citing *Shutts* and decertifying a nationwide class where the trial court "certified what appears to be a nationwide class without addressing such issues as choice of law"); *Carroll* v. *Cellco Partnership*, 713 A.2d 509, 513-14 (N.J. Super. Ct. App. Div. 1998) (reversing for failure

By removing the burden of demonstrating the lack of, or at least manageable, variations in the applicable substantive law prior to certification, these decisions deny the reasonable expectations of the parties that their disputes would be governed under the law selected. In *Shutts*, "the expectations of the parties" was indeed considered "an important element" in "considering [the] fairness" of the constitutional limitations on the choice-of-law decision. 472 U.S. at 822; see also *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 327 (1981) (Stevens, J., concurring in judgment). The upshot of the decision below applying Oklahoma law is that not only Amoco but also numerous class members in states other than Oklahoma who signed agreements outside of Oklahoma that select the laws of a state other than Oklahoma and concern wells outside of Oklahoma will be forced to have their claims evaluated under Oklahoma law during the post-certification settlement negotiations and, absent any showing to the contrary, throughout the trial.

In relieving Lobo of its burden to demonstrate that differences in the applicable law are manageable, the Oklahoma court offered absent class members who might object to their claims being adjudicated under foreign law only the possibility that they could opt-out of the class. See Pet. App. 52a, 53a. In *Shutts*, however, this Court expressly rejected that rationale, giving "little credence to the idea that [forum] law should apply to all claims because the plaintiffs, by failing to opt out, evinced

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to analyze variations in applicable law; "[a] thorough analysis of state laws is particularly important in circumstances where . . . there is a possibility that common issues could be subsumed by substantive conflicts in state laws"); *Purcell & Wardrope, Chartered* v. *Hertz Corp.*, 664 N.E.2d 166, 169-70 (Ill. App. Ct. 1996) (affirming trial court's denial of certification for failure to brief law of all relevant states).

their desire to be bound by Kansas law." 472 U.S. at 820. Similarly, the mere reservation of power to alter the class at some later date does nothing to guarantee the procedural rights of the parties to have their claims adjudicated and perhaps finally decided under the proper law within the "constitutional limits on choice of substantive law." *Id.* at 821. Moreover, "opting out" is not available to Amoco, and thus Oklahoma law may expose it to numerous claims that would not be available if the choice-of-law clauses Amoco negotiated with many putative class members were applicable.

As *Shutts* emphasized, "[t]here can be no injury in applying [forum] law if it is not in conflict with that of any other jurisdiction connected to this suit." *Id.* at 816. Although Petitioner Amoco certainly did not have the burden of establishing conflicts of laws, it nevertheless made a record—even based on a partial survey of certain States and legal issues—that numerous, actual conflicts of laws exist among the different States on the claims stated in Lobo's complaint. For example, there are significant differences in the substantive law of fraud among the States,[4] variations in tortious breach of contracts,[5] dif-

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[4] For instance, in a fraud claim, justifiable reliance on a misrepresentation is sometimes required, *see Allgood* v. *R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171 (5th Cir. 1996); *Burroughs* v. *Jackson Nat'l Life Ins. Co.*, 618 So. 2d 1329, 1332 (Ala. 1993), while other states require reasonable reliance, *see Parks* v. *Morris Homes Corp.*, 141 S.E.2d 129, 132 (S.C. 1965). States also impose varying standards to determine when there is a duty to disclose facts. *See Sugarhouse Fin. Co.* v. *Anderson*, 610 P.2d 1369, 1373 (Utah 1980) (finding no duty when transaction was made at arm's length); *Dodd* v. *Nelda Stephenson Chevrolet, Inc.*, 626 So. 2d 1288, 1293 (Ala. 1993) (using a flexible standard based on the transaction and relationship of the parties).

[5] The existence of a tort cause of action for breach of contract also varies considerably from the tortious breach of contract concept in Oklahoma law. *See* Alabama: *Kennedy Elec. Co.* v. *Moore-*

fering statutes of limitations,[6] and, in light of the financial prominence of several large companies in the class, very

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Handley, Inc., 437 So. 2d 76, 81 (Ala. 1983) ("We are not prepared to extend the tort of bad faith beyond the area of insurance policy cases at this time."); New Mexico: *Isler* v. *Texas Oil & Gas Corp.*, 749 F.2d 22, 23 (10th Cir. 1984) ("The effect of confusing the concept of contractual duties, which are voluntarily bargained for, with the concept of tort duties, which are largely imposed by law, would be to nullify a substantial part of what the parties expressly bargained for—limited liability."); Kansas: *Ford Motor Credit Co.* v. *Suburban Ford*, 699 P.2d 992, 998 (Kan. 1985) ("It should be emphasized that all parties to this action were in a *contractual* relationship with each other, and their difficulties with each other arise directly from that contractual relationship."); Michigan: *Haas* v. *Montgomery Ward and Co.*, 812 F.2d 1015, 1016 (6th Cir. 1987) ("[A]n action in tort will not arise for breach of contract unless the action in tort would arise independent of the existence of the contract."); Texas: *English* v. *Fischer*, 660 S.W.2d 521, 522 (Tex. 1983) ("This concept is contrary to our well-reasoned and long-established adversary system which has served us ably in Texas for almost 150 years.").

[6] Amoco demonstrated that the applicable statute of limitations for breach of contract may be 3, 4, 5, 6, 8, or 10 years, depending on the state law selected. *See* Ala. Code § 6-2-34 (1997) (six years); Alaska Stat. § 09.10.053 (1997) (three years); Colo. Rev. Stat. § 13-80-101(1)(a) (1997) (three years); Kan. Stat. Ann. § 60-511 (1997) (five years); Mich. Comp. Laws § 600.5807 (1997) (six years); Mont. Code Ann. § 27-2-202 (1997) (eight years); N.M. Stat. Ann. § 37-1-3 (1997) (six years); Okla. Stat. Ann. tit. 12, § 95(1) (1997) (five years); Tex. Civ. Prac. & Rem. Code Ann. § 16.004 (1997) (four years); Utah Code Ann. § 78-12-23 (1997) (six years); Wyo. Stat. Ann. § 1-3-105(a)(ii)(A) (1997) (ten years). Similarly, the applicable statute of limitations for fraud can be 2, 3, 4, or 6 years, again depending on the state law selected. *See* Ala. Code § 6-2-3 (1997) (two years); Alaska Stat. § 09.10.070 (1997) (two years); Colo. Rev. Stat. § 13-80-101(1)(c) (1997) (three years); Kan. Stat. Ann. § 60-513 (1997) (two years); Mich. Comp. Laws § 600.5813 (1997) (six years); Mont. Code Ann. § 27-2-203 (1997) (two years); N.M. Stat. Ann. § 37-1-4 (1997) (four years); Okla. Stat. Ann. tit. 12, § 95(3) (1997) (two years); Tex. Civ. Prac. & Rem. Code Ann. § 16.004 (1997) (four years), *construed in Williams* v. *Khalaf*, 802 S.W.2d 651, 654-58 (Tex. 1990); Utah Code Ann. § 78-12-26 (1997) (three years); Wyo. Stat. § 1-3-105(a)(iv)(D) (1997) (four years).

signficant differences in definitions of who may statutorily bring a consumer protection claim.[7]

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[7] As Petitioner demonstrated in DX52, the definition of "consumer" varies considerably and effects the availability of consumer protection laws. *See* La. Rev. Stat. Ann. § 51:1402 (1997) (" 'Consumer' means any person who uses, purchases, or leases goods or services."); Tex. Bus. & Comm. Code Ann. § 17.45 (1997) (" '[c]onsumer' means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more"); Wyo. Stat. Ann. § 40-12-102 (1997) (" '[c]onsumer transaction' means the advertising, offering for sale, sale or distribution of any merchandise to an individual for purposes that are primarily personal, family or household"); Utah Code Ann. § 13-11-3 (1997) (" 'Consumer transaction' means a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property, both tangible and intangible (except securities and insurance), to a person for primarily personal, family, or household purposes, or for purposes that relate to a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged, or a solicitation or offer by a supplier with respect to any of these transfers or dispositions. It includes any offer or solicitation, any agreement, any performance of an agreement with respect to any of these transfers or dispositions, and any charitable solicitation as defined in this section."); Alaska Stat. § 45.50.561 (1997) (" '[c]onsumer' means a person who seeks or acquires goods or services by lease or purchase"); Mont. Code Ann. § 30-14-1102 (1997) (" 'Consumer' means an individual who borrows money or leases or obtains property or services under a written agreement." " 'Consumer contract' means an agreement for the sale, lease, or loan of money, property, or services primarily for personal, family, or household purposes."); and Kan. Stat. Ann. § 50-624 (1996) (" 'Consumer' means an individual or sole proprietor who seeks or acquires property or services for personal, family, household, business or agricultural purposes." " 'Consumer transaction' means a sale, lease, assignment or other disposition for value of property or services within this state (except insurance contracts regulated under state law) to a consumer; or a solicitation by a supplier with respect to any of these dispositions.").

II. AN ORDER CERTIFYING A NATIONWIDE CLASS ACTION IN A MANNER THAT DENIES DUE PROCESS IS REVIEWABLE BY THIS COURT.

Petitioner Amoco should not be forced to proceed to trial against a class that was certified in a patently constitutionally defective manner. Such a result denies a procedural right that cannot be remedied on further review, improperly determines the property rights of the absent class members, and implicates issues fundamental to the fairness of the trial. A defendant forced to expend substantial time and money defending a class action, only to have the class decertified on appeal, has suffered irreparable injury. See, *e.g.*, *Herbst* v. *International Tel. & Tel. Corp.*, 495 F.2d 1308, 1312 (2d Cir. 1974). Conservation of judicial resources and effective management of dockets indeed suggest that full interlocutory review of constitutionally defective nationwide certification decisions be available to avoid needless expenditures. See, *e.g.*, *Parkinson* v. *April Indus., Inc.*, 520 F.2d 650, 653-54 (2d Cir. 1975). And unlike other interlocutory reviews, certification issues are discrete and standards are already being developed for the limitation of such reviews under Fed. R. Civ. P. 23(f). Indeed, Oklahoma law considers the certification decision sufficiently final to provide for immediate appeal. See Okla. Stat. Ann. tit. 12, § 993(A)(6).

Without such review, nationwide class action defendants in state courts lack effective federal review of constitutional violations in the certification process because of the widely acknowledged reality that certification decisions create almost irresistible pressures to settle. The certification decision itself often compels capitulation by defendants unwilling to risk potentially huge liability given "the sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, exposes"

the defendant. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (Posner, J).[8] As the Seventh Circuit has recently re-emphasized, the grant of class certification is the "mirror image of the death-knell situation, when the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999). Class certification certainly enhances the value of unmeritorious claims, by making it more likely that defendants will be found liable for higher damage awards.[9] Indeed, as Judge Friendly argued, class settlements created by a small probability of a huge judgment post-certifications creates "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (173).

This Court has traditionally given a " 'practical rather than a technical construction' " to the finality requirement. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974); *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541,

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[8] *See also* 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.19, at 56 (2d ed. 1992) ("Certification may impose enormously expensive burdens, and may make settlement imperative or impossible."); Jordon L. Kruse, Comment, *Appealability of Class Certification Orders: The 'Mandamus Appeal' and a Proposal to Amend Rule 23*, 91 Nw. U. L. Rev. 704, 705 (1997); Peter H. Schuck, *Mass Tortes: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 958 (1995); Joseph Grundfest, *Disimplying Private Rights of Action under the Federal Securities Laws: The Commission's Authority*, 107 Harv. L. Rev. 963, 973 n.38 (1994); William Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 389 (1972).

[9] *See Castano* v. *American Tobacco Co.*, 84 F.3d 737, 746 (5th Cir. 1996) (citing *"Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 165-66 (2d Cir. 1987); *Manual For Complex Litigation* § 33.26 n.1056; Kenneth S. Bordens and Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 Judicature 22 (1989)).

546 (1949).[10] In *Hudson Distributors, Inc.* v. *Eli Lily & Co.*, 377 U.S. 386 (1964), this Court held that, "[t]he fact that separate and unresolved issues are pending in the Ohio courts and subject to 'further proceedings' . . . does not render the judgment of the Ohio Supreme Court on the issue here considered and decided nonfinal or unappealable within the meaning of 28 U.S.C. § 1257." *Id.* at 389, n.4. The *in terrorem* effect of certification of unlitigable class actions gives the denial of a *defendant's* due-process and full-faith-and-credit rights in the certification process a practical finality. Compare *Gillette Co.* v. *Miner*, 459 U.S. 86, 86 (1982) (dismissing for lack of jurisdiction "[t]here being no final judgment" when a state supreme court upheld a finding of personal jurisdiction over *plaintiff* class-members based on *defendant's* objections).

Petitioner Amoco is certainly mindful of this Court's decision in *Jefferson* v. *City of Tarrant*, 522 U.S. 75 (1997), that denied review of a state interlocutory appeal from a civil rights action. *Jefferson*, however, did not confront the difficult issues unique to class actions and, indeed, affirmed the categories articulated in *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469 (1975). In *Cox*, this Court recapitulated the numerous cases in which it has considered decisions on federal issues to be final for the purposes of 28 U.S.C. § 1257, despite the pendency of further proceedings in the state courts. Such jurisdiction is essential to avoid "the mischief of economic waste and of

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[10] *See also, e.g., American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274, 279 (1980); *National Socialist Party of Am.* v. *Village of Skokie*, 432 U.S. 43, 44 (1977) (per curiam); *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 476-87 (1975); *Hudson Distribs., Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964); *Brady* v. *Maryland*, 373 U.S. 83, 85 n.1 (1963); *Local No. 438 Constr. & Gen. Laborers' Union* v. *Curry*, 371 U.S. 542, 548-52 (1963).

delayed justice." *Id.* at 478. The *Cox* Court found jurisdiction in those cases "in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. Additionally, the *Cox* Court found Supreme Court jurisdiction over cases where the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state court proceedings. See *id.* at 480. Further, it found jurisdiction where refusal to accept such jurisdiction would erode significant federal policies. See *id.* at 482-83.

Procedural rights, such as Sixth Amendment confrontation rights, see *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 47-50 (1987), arbitration preemption, see *Southland Corp.* v. *Keating*, 465 U.S. 1, 7 (1984), and, most significantly, due process concerns, see *Shaffer* v. *Heitner*, 433 U.S. 186, 195 n.12 (1977); *Calder* v. *Jones*, 465 U.S. 783, 788 n.8 (1984), have traditionally been considered to fall within these exceptions to the finality doctrine.[11] Like these other largely procedural provisions, class certification procedure dealing with nationwide classes and vast numbers of possible claims—including punitive damages— profoundly impact the fairness of the adjudicatory process in a manner that raises issues of such constitutional moment that only the availability of review by this Court can prevent a miscarriage of justice.[12]

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[11] *See also Bullington* v. *Missouri*, 451 U.S. 430, 446 (1981) (reviewing Double Jeopardy issue before retrial); *Harris* v. *Washington*, 404 U.S. 55, 56-57 (1971) (same).

[12] More than 20 years ago, when this Court confronted the issue of interlocutory appeal from the *denial* of class certification in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), this Court resolved a conflict among the circuits and refused to allow "death-

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

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knell" appeals from denial of class certification. It did so, however, because the methods formulated by the courts of appeals did not provide "an acceptable basis for the exercise of appellate jurisdiction" in that they either engaged in "a legislative, not judicial, function" of deciding when to grant an appeal or were so individualized as to require excessive impacts "on the judicial system's overall capacity to administer justice." *Id.* at 472-73. Finally, this Court disapproved "death-knell" appeals because they authorized time-consuming, "*indiscriminate* interlocutory review" of certifications. *Id.* at 474.

Nevertheless, the new powers conferred by amendments to 28 U.S.C. § 1292(e) and implemented in the new Fed. R. Civ. P. 23(f) make clear that Congress has now made the legislative determination concerning the desirability of the immediate appealability of class certifications, found lacking by this Court in *Coopers & Lybrand*. *See* Fed. R. Civ. P. 23(f) ("A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."). Congress has now in fact authorized interlocutory appeal of class certification, *see id.*, as has the Oklahoma legislature, *see* Okla. Stat. Ann. tit. 12, § 993(A)(6).

Respectfully submitted,

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March 9, 2000

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APPENDICES

APPENDIX A

[Filed May 28, 1999]

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA
DIVISION NO. I

Case Number 91,757

LOBO EXPLORATION COMPANY,
an Oklahoma corporation,
Plaintiff/Appellee,

versus

AMOCO PRODUCTION COMPANY,
a Delaware corporation,
Defendant/Appellant.

Appeal from the District Court of
Beaver County, Oklahoma
Honorable George H. Leach, Trial Judge

AFFIRMED

OPINION

Opinion by CAROL M. HANSEN, Presiding Judge:

Plaintiff/Appellee, Lobo Exploration Company (Lobo), sued Defendant/Appellant, Amoco Production Company

(Amoco), alleging Amoco double-billed certain costs for oil and gas wells where Lobo was a working interest owner and Amoco the operator. Lobo moved to certify the matter as a class action. After a seven-day evidentiary hearing, the trial court issued an order certifying the class. The class was defined as follows:

> All persons or entities who own or owned an interest in any drilling and spacing unit, secondary recovery unit, or other enhanced recovery unit or property, or in oil and gas wells wherein Amoco was or is the operator, and where Amoco (a) used allocation accounts, sometimes referred to as "functional location accountability codes" ("FLACS") and/or "Operating Centers" to bill and collect indirect charges and/or (b) billed and collected charges for the services of supervisors above first line supervision.
>
> Specifically excluded from the class are: (a) any and all Amoco offshore operated properties; (b) any forced pooled working interest, unless the force pooled working interest owner entered into a joint operating agreement that superseded the pooling order; (c) all claims for improper billing of charges prior to January 1, 1983; (d) all agencies, departments or instrumentalities of the United States of America; and (e) Conoco Inc. and other persons or entities whom Plaintiff's counsel is prohibited from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct.

Amoco appeals pursuant to 12 O.S. Supp. 1997 § 993 (A)(6). We affirm.

In order to certify a class, the trial court must find (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the

representative parties are typical of those of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. 12 O.S. 1991 § 2023(A). In addition, it must find one of the alternative conditions of Subsection B of 12 O.S. 1991 § 2023. "Class determination . . . should be made by the court in a practical and realistic manner, based on what is actually involved in the litigation. No mechanical formula exists which can be applied to all cases." *Mattoon v. City of Norman*, 1981 OK 92, 633 P.2d 735, 740-41. Accordingly, we will not disturb an order certifying a class unless abuse of discretion is shown. *Black Hawk v. Exxon*, 1998 OK 70 ¶ 10, 969 P.2d 337, 342. A close question should be resolved in favor of sustaining certification because the order is always subject to modification prior to judgment on the merits. *Perry v. Meek*, 1980 OK 151 ¶ 19, 618 P.2d 934, 940.

I

Amoco first contends the trial court's failure to evaluate and resolve differences in state laws violated mandates of the U.S. Supreme Court, due process guarantees of the U.S. Constitution, and Oklahoma choice of law requirements. It argues the trial court did exactly what the Kansas courts attempted and the U.S. Supreme Court rejected in *Phillips Petroleum Company v. Shutts (Shutts)*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). In that case, royalty owners brought a class action in Kansas state court against Phillips to recover interest on royalties suspended pending regulatory approval of gas price increases. The class representatives lived in Kansas and Oklahoma, while the 28,100 class members resided in all fifty states, the District of Columbia, and several foreign countries. The affected leases were in eleven different states, with only a few in Kansas The case was tried on its merits to the trial court, which applied Kansas law

and held Phillips liable to prejudgment and post-judgment interest on the suspended royalties.

Phillips appealed to the Kansas Supreme Court, arguing the Kansas trial court (1) did not have personal jurisdiction over the absent class members under the minimum contacts requirement of *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and (2) could not apply Kansas law to every claim in the dispute. The Kansas Supreme Court affirmed the trial court's judgment. On certiorari, the U.S. Supreme Court affirmed as to the personal jurisdiction issue, holding the minimum procedural due process protection required to be provided to an absent class plaintiff includes (1) notice and opportunity to be heard, (2) opportunity to opt out of the class, and (3) adequate representation by the named plaintiff.

However, it reversed to the extent the Kansas Supreme Court held Kansas law was applicable to all the transactions being adjudicated in the case. The Court quoted its opinion in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313, 101 S.Ct. 633, 639-640, 66 L.Ed.2d 521 (1981), as setting forth the rule that the Due Process Clause and Full Faith and Credit Clause require "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Shutts*, 472 U.S. at 818, 105 S.Ct. at 2978. The Court then evaluated Kansas' contacts to the litigation and stated,

> [W]hile a State may, for the reasons we have previously stated, assume jurisdiction over the claims of plaintiffs whose principal contacts are with other States, it may not use this assumption of jurisdiction

> as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law. It may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a "common question of law." The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum.
>
> Kansas must have a "significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class, contacts "creating state interests," in order to ensure that the choice of Kansas law is not arbitrary or unfair. Given Kansas' lack of "interest" in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits. (Citation and footnote omitted)

Id., 472 U.S. at 821-822, 105 S.Ct. at 2979. The U.S. Supreme Court left to the state court the question of which law to apply to the various transactions, and remanded the case for further proceedings. *Id.*, 472 U.S. at 823, 105 S.Ct. at 2980. The case then continued as a class action in state court. *Shutts v. Phillips Petroleum Co.*, 240 Kan. 764, 732 P.2d 1286 (1987), cert. denied, 487 U.S. 1223, 108 S.Ct. 2883, 101 L.Ed.2d 918 (1988).

Amoco argues *Shutts* requires that a state court resolve conflict of laws issues before certifying a nationwide class. It asserts the trial court "decreed Oklahoma law as the governing law for the claims of a nationwide class of working interest owners" without examining state law conflicts and thereby violated the mandate of *Shutts*. In its order certifying the class, the trial court cited *Shutts* in ruling "Oklahoma is not precluded from applying its own law in a class action so long as it has a 'significant contact or aggregation of contacts' to the claims asserted by each member of the plaintiff class such that application of the forum law is not arbitrary or unfair." It found Amoco had "significant and numerous" contacts with Oklahoma, including maintaining corporate offices in Tulsa, Oklahoma for over thirty years, centralizing its nationwide joint interest billings at the Tulsa office, and directing complaints and audits regarding Amoco-operated properties nationwide to the Tulsa office. The trial court concluded "the nationwide class sought to be certified in this case does not violate fundamental principles of due process or exceed the jurisdictional bounds of the Court." It then stated,

> Although Amoco argues that inevitable conflicts of law will make a class action unmanageable, Amoco has failed to show an actual conflict of law that has a material effect on this action. It is the defendants' burden to demonstrate the existence of a true conflict of law. Moreover, at the certification stage it is improper to decide which law applies. (Citations omitted.)

Shutts contains no language requiring resolution of conflict of laws questions prior to certifying a class. To the contrary, the Supreme Court remanded the case without disturbing its class action status. While some courts view *Shutts* as requiring a determination of conflict of

laws questions at the threshold of determining whether common issues of law predominate,[1] others consider that the minority view.[2] As *In Re Kirschner Medical Corp.*, 139 F.R.D. 74, 83 (D. Md. 1991), the trial court in the instant case followed the rule of *Shutts* in finding the law of the forum state could be applied constitutionally, but declined to decide choice of law issues incident to a motion for class certification. It has not "decreed Oklahoma law as the governing law for the claims of a nationwide class of working interest owners" as Amoco asserts, but has reserved that issue for determination upon reaching the merits. Upon reaching those issues, it has the "flexibility and discretion to modify, or even to set aside, its order of certification if later developments demonstrate a need to do so." *Black Hawk v. Exxon*, 1998 OK 70 ¶ 10, 969 P.2d 337. The trial court's order did not violate *Shutts*.

II

Amoco's second and third contentions of error challenge the trial court's finding common questions of law or fact predominate. Its fifth contention of error challenges the finding a nationwide class action is a superior method of adjudicating the controversy. Both these requirements arise from 12 O.S. 1991 § 2023(B)(3).

The existence of comon issues of law or fact is a requirement for class action certification under 12 O.S. 1991 § 2023(A). One of the three alternative require-

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[1] See, e.g., *Poe v. Sears, Roebuck and Co.*, No. CivA1:96-CV-358-RLV, 1998 WL 113561 at *4 (N.D. Ga.) and *Ford Motor Co. Ignition Switch Products Liability Litigation*, 174 F.R.D. 332, 347-348 (D. N.J. 1997)

[2] *In Re Kirschner Medical Corp.*, 139 F.R.D. 74, 83 (D. Md. 1991), *Delgozzo v. Kenny*, 628 A.2d 1080, 1091-1092 (N.J. 1993), and *Peterson v. Dougherty Dawkins, Inc.*, 583 N.W.2d 626, 629-630 (N.D. 1998).

ments of § 2023(B) is a finding that the common issues predominate and a class action is the superior method for adjudicating the controversy. Because Oklahoma's § 2023 "bears great similarity to the provisions of Rule 23, Federal Rules of Civil Procedure, we may resort to federal authority to shed light on its rationale." *Mattoon v. City of Norman*, 1981 OK 92, 633 P.2d 735, 737. In *Doe v. Guardian Life Ins. Co.*, 145 F.R.D. 466, 475 (N.D. Ill. 1992), the court addressed the difference in focus between Subsections (a)(2) and (b)(3).

> [W]hile Rule 23(b)(3) is often considered in conjunction with the commonality requirement of Rule 23(a)(2), the focus of Rule 23(b)(3) is actually different. "Whereas (a)(2) addresses the issue of whether Rule 23 has any applicability at all to the law suit, (b)(3) addresses the issue of whether Rule 23 certification will have practical utility in the suit, considering the facts, substantive law, procedural due process, and fundamental fairness." . . . Specifically, the predominance question under Rule 23(b)(3) requires the court to consider whether the group seeking class certification seeks to remedy a common legal grievance. (Citations omitted)

The Advisory Committee Notes to the 1966 Amendment of FRCP Rule 23 reflect Subsection (b)(3) was intended to encompass "those cases in which a class action would achieve economies of time, effort, and expense," while excluding from class action status cases which "would degenerate in practice into multiple lawsuits separately tried."

Here the trial court ruled,

> Amoco treated all the non-operating working interest owners the same with respect to the issues involved in this case, despite differing forms of agree-

> ments. The acts or omissions of Amoco which constitute the alleged breaches of contract and/or fraud, as well as the other causes of action pleaded by Lobo, are the same or similar acts or omissions for each class member. The court concludes, therefore, that common questions predominate where the acts or omissions are the same, even though damage amounts may vary.

It then found a class action was superior to any other available method for a fair and efficient adjudication of the controversy because the average claim of each of the more than 2,700 working interest owners was relatively small compared to the expense of litigating the claims. The trial court placed the burden on Amoco "to demonstrate the existence of a true conflict of law," quoting *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*, 1994 OK 20, 896 P.2d 503, 513, cert. denied, 516 U.S. 975, 116 S.Ct. 476, 133 L.Ed.2d 405 (1995) ("One who asserts that a law different from that of Oklahoma governs the dispute bears the burden of identifying and invoking that other law.") The trial court rejected Amoco's argument inevitable conflicts of law would make a class action unmanageable because "Amoco has failed to show an actual conflict that has a material effect on this action."

A.

On appeal, Amoco contends variations in state substantive law applicable to the claims of the nationwide class preclude any finding of predominance. First, it argues Lobo bore the burden of establishing there are no conflicts between the laws of the various states at issue, citing federal authority.[3] Other federal and state courts

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[3] *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986), *Endo v. Albertine*, No. 88 C 1815, 1995 WL 170030 at *5 (N.D. Ill.), *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996),

have rejected such a requirement at the class certification stage.[4] In *Weatherly v. Deloitte & Touche*, 905 S.W.2d 642 (Ct.App.Tex. 1995), the Texas court applied Texas law placing the burden of showing a conflict on the party asserting application of foreign law when it rejected the class opponent's argument that conflict of laws issues defeated predominance. The trial court here followed an identical rationale, and properly placed the burden upon Amoco to prove the law of another state governed the dispute while placing the burden upon Lobo to prove the requirements of § 2023 were satisfied. *First Life Assur. Co. v. Mountain*, 1993 OK CIV APP 20, 848 P.2d 1177, 1178-1179.

Lobo's petition raises alternative legal theories, including fraud, obtaining money through false pretenses and deceit, breach of contract, unjust enrichment, accounting, tortious/bad faith breach of contract, and violation of the Oklahoma Consumer Protection Act, to recover for damages arising from a single set of facts, to wit, that Amoco double-billed working interest owners by billing as direct costs items which were also included in the "combined fixed rate" overhead charge. The trial court's finding the same acts or omissions of Amoco formed the basis of each class member's claims is well supported by the evidence cited in its order. For example, in its response to an audit exception letter by Lobo's accounting expert, Amoco stated, "We have approximately 60 audits performed on Amoco operated properties each year, all of

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In re American Medical Sys., 75 F.3d 1069, 1085 (6th Cir. 1996), and *In re Ford Motor Co. Ignition Switch Prod. Liab. Litig.*, 174 F.R.D. 332, 349-350 (D. N.J. 1997).

4 *Longden v. Sunderman*, 123 F.R.D. 547, 556 (N.D. Tex. 1988), *Roberts v. Helm*, 670 F.Supp. 1466, 1494 (N.D. Cal. 1987), *Peterson v. Dougherty Dawkins, Inc.*, 583 N.W.2d 626, 629 (N.D. 1998), *Gordon v. Boden*, 586 N.E.2d 461 (Ct.App.Ill. 1991).

which receive charges in the same manner and using the same systems as those used to generate charges to this Unit." Amoco's former audit coordinator, J.D. Shearrer, testified Amoco relied on COPAS [5] agreements in determining what was chargeable to the joint account. He agreed Amoco gave a standard response to audit exceptions based on the COPAS provisions. In addition, Lobo entered into evidence an April 10, 1995 meeting agenda of Amoco's "COPAS Review Committee," which showed Shearrer was to give a "[s]hort presentation on how we are 'double dipping' the joint account through charges to the O/C [Operations Center] account. This may provide a basis for compromise if we have to negotiate settlement on some audits." This record supports the trial courts finding Amoco treated the class members uniformly with respect to the disputed charges. Accordingly, the trial court did not abuse its discretion in ruling common issues predominate.

Amoco argues the substantive law governing the common law claims contains "irreconcilable conflicts" that preclude any finding of predominance, but does not identify any such common law conflicts. It does identify differences among the states' consumer fraud statutes and cites numerous cases for the proposition that application of multiple states' consumer fraud or consumer protection laws creates such conflicts as to defeat predominance. However, in those cases the conduct complained of took place in multiple states.[6] In another case cited by Amoco,

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[5] "An accounting procedure prepared by Council of Petroleum Accountants Societies of North America," Williams and Meyers, *Manual of Oil and Gas Terms*, p. 148 (5th ed. 1981).

[6] E.g., *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996) (using 1-900 pay-per-call numbers in sweepstakes promotions and credit card offers), *O'Brien v. J.I. Kislak Mort. Corp.*, 934 F.Supp. 1348 (S.D. Fla. 1996) (understating mortgage finance

Martin v. Dahlberg, 156 F.R.D. 207, 218 (N.D. Cal. 1994), the court stated,

> Defendants have shown that true conflict exists among the various consumer protection laws of the various states; however, they have not shown that any state other than California has an interest in applying its own laws, nor have defendants attempted to meet their burden of establishing that the application of California law would impair the interests of any foreign state.

Here Lobo complains of Amoco's conduct in Oklahoma. Oklahoma has an interest in redressing wrongs committed within the state.[7] Amoco has not shown any state other than Oklahoma has an interest in applying its consumer protection laws or that the application of Oklahoma's Consumer Protection Act would impair the interests of another state. Similarly, Oklahoma may apply its own punitive damages law to punish unlawful conduct in Oklahoma and deter its repetition. *BMW of N. Am., Inc. v Gore*, 517 U.S. 559, 568, 116 S.Ct. 1589, 1595, 134 L.Ed.2d 809 (1996). The trial court did not abuse its discretion in ruling Amoco showed no actual conflicts material to this action.

B.

Amoco next argues the trial court abused its discretion in certifying the class because individual issues are raised by certain elements of the claims and by its affirmative defenses. It contends (1) the class includes members "who knew about [Amoco's] accounting procedures and

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charges), and *In Re Stucco Litig.*, 175 F.R.D. 210 (E.D. N.C. 1997) (falsely advertising defective exterior finish system).

7 See, e.g., *Martin v. Heinold Commodities, Inc.*, 510 N.E.2d 840, 847 (Ill. 1987) and *State ex rel. Corbin v. Pickrell*, 667 P.2d 1304, 1312 (Az. 1983).

accepted those charges," and "who objected to Amoco's accounting procedures and then settled and released their claims," (2) each class member must show individual reliance on misrepresentations, and (3) the claims of many class members are barred by statutes of limitation, laches, waiver, and estoppel. In *Black Hawk v. Exxon*, 1998 OK 70, ¶¶ 18, 29, 969 P.2d 337, the Oklahoma Supreme Court addressed similar arguments and stated,

> This argument relates to the merits of the action, and inquiry into the merits is inappropriate when the court is deciding whether a class should be certified.
>
> . . .
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> . . . Inability to prove reliance on defendants' misrepresentations may ultimately defeat [plaintiffs'] claims but the mere possibility that their proof on this issue might fail is not grounds to deny certification of the class. . . . Nevertheless, in order to establish causes of action for fraud, at trial plaintiffs must prove all elements necessary to prove fraud including their reliance on defendants' representations.

Amoco's arguments relate to the merits of its defenses. The trial court properly avoided reaching the merits of the action on a motion to certify a class.

C.

Amoco contends the trial court erred in finding a class action is a superior method of adjudicating the controversy because individual issues render a class action unmanageable. In determining the superiority of a class action, the trial court is required to balance "the benefits which the class action procedure has over other alternative methods of adjudicating the dispute . . . against the management problems which may arise from class treatment." *Shores v. First City Bank Corp.*, 1984 OK 67, 689 P.2d

299, 305. Here the trial court reasoned that the claim of each working interest owner was small relative to the costs of litigating the claim. Therefore, individual litigation of their claims would be difficult or impossible for the members and would substantially increase the burden on the court system. It concluded the litigation was more manageable as a class action than if undertaken individually, even though management problems would arise. We find no abuse of discretion in the trial court's action.

III

Amoco's last contention of error is Lobo did not prove typicality or adequacy of representation. It argues the trial court ignored evidence that Lobo's claims were materially distinct from and antagonistic to those other class members.

The typicality requirement focuses on the similarity of the legal and remedial theories behind the class members' claims. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986). It is not a high threshold. *Shipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir. 1993) reh. den. 996 F.2d 309 (5th Cir. 1993), cert. den. 114 S.Ct. 548, 510 U.S. 991, 126 L.Ed.2d 450 (1993). "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." 84 F.3d 1525, 1540 (8th Cir. 1996). Here the trial court's finding of typicality is amply supported by the record. The factual variations argued by Amoco may affect the amount of damages but do not preclude class certification.

Amoco argues Lobo's interests conflict with "many absent class members [who] have followed the same accounting and billing procedures alleged to have been

fraudulent" by Lobo. The trial court ruled the evidence at hearing "did not reveal that Lobo has claims which are in any way antagonistic to the claims of members of the proposed class." Amoco has not alleged or cited evidence Lobo has claims against other class members relating to the subject matter of this litigation, and no such claims appear "obvious and pervasive" in the record. *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977) and *Newberry v. Washington Post Co.*, 71 F.R.D. 25, 26 (D.D.C. 1976). If there are class members who do not want to pursue their claim against Amoco, they may eliminate any conflict by opting out. *Marshall v. Holiday Magic, Inc.*, 550 F.2d at 1177. The trial court did not abuse its discretion in finding Lobo is an adequate representative of the class.

For the foregoing reasons, the trial court's order certifying the class is AFFIRMED.

JONES, C.J., and ADAMS, J., concur.

APPENDIX B

[Filed July 17, 1998]

IN THE DISTRICT COURT OF BEAVER COUNTY
STATE OF OKLAHOMA

Case No. CJ-97-72

LOBO EXPLORATION COMPANY,
an Oklahoma Corporation,
Plaintiff,

vs.

AMOCO PRODUCTION COMPANY,
a Delaware Corporation,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiff Lobo Exploration Company ("Lobo") moved for certification of the instant action against Amoco Production Company ("Amoco") as a class action pursuant to 12 Okla. Stat. § 2023. The Court conducted a seven-day evidentiary hearing on Plaintiff's Motion for Class Certification beginning on June 15, 1998, and ending on June 23, 1998, and thereafter took the matter under advisement. The evidence presented by the parties was extensive and took the form of briefs, including exhibits attached thereto, affidavits, deposition testimony, live witnesses, numerous exhibits and the arguments of counsel. Based upon the matters presented at the hearing, and hav-

ing reviewed and considered the evidence and having been fully advised on the matter, the Court makes the following Findings of Fact, Conclusions of Law and Order. The following findings are not as to the merits of the claims and defenses; rather, the findings represent the Court's determination that the requisites for proceeding as a class action pursuant to applicable Oklahoma law have been satisfied at this stage of the proceeding.

FINDINGS OF FACT

1. Lobo is or was a working interest owner in wells that are or were operated by Amoco. Lobo is an independent oil and gas producer headquartered in Oklahoma City, Oklahoma.

2. The proposed Plaintiff Class consists of over 2,700 past and present working interest owners who received monthly joint interest billings from Amoco.

3. Lobo contends that Amoco created and implemented a pervasive, long-term, complex scheme to unlawfully profit by fraudulently double billing its non-operating working interest owners in wells and units operated by Amoco within the United States. Lobo contends that Amoco carried out its scheme to defraud the Class by billing overhead charges and indirect charges first as a combined fixed rate overhead and a second time as a direct charge (including services of supervisors above first level supervision and off-site technical labor). Lobo contends that Amoco carried out its scheme to defraud the Class by the use of allocation accounts, sometimes referred to as "Operation Centers" and/or "Functional Location Accountability Codes" ("FLACS") which were devised by Amoco to hide, in an extremely complex system, the improper and illegal charges. Lobo contends that Amoco used the same accounting system and methodology to bill

Class members on Amoco operated properties nationwide and the billing practices and accounting procedures are standardized within Amoco and are centralized in Tulsa, Oklahoma. (*See* Plaintiff's Exhibits *2SS* and *10D*.)[1]

4. Lobo presented extensive evidence that demonstrated and supports the Court's finding that Amoco bills the Class members uniformly for the allegedly fraudulent charges, makes uniform, standard written representations to the Class members and engaged in a common course of conduct with respect to the Class. (*See* Plaintiff's Exhibits *2J, 2K, 2M, 2N, 2P, 2Q, 2R, 2S, 2T, 2W, 2X, 2Y, 2BB, 2CC, 2DD, 2EE, 2FF, 2GG, 2JJ, 2KK, 2LL, 2OO*, and related exhibits cited therein.)

5. Lobo has alleged claims for breach of contract, fraud, obtaining money through false pretenses (deceit), unjust enrichment, accounting, tortious/bad faith breach of contract, conspiracy and violation of the Oklahoma Consumer Protection Act. Amoco denies these allegations. The truth of any of these contentions by the parties will be determined at the trial on the merits. The focus, however, for certification is that there are issues of fact or law common to the class and that these issues predominate. The contentions of Lobo, and Amoco's contrary contentions, are common issues to be determined in this case.

6. 12 Okla. Stat. § 2023 sets forth five requirements that must be satisfied for a class to proceed as a class action: (1) numerosity, (2) commonality, (3) typicality, (4) adequacy of representation, and (5) predominance of common issues and superiority of a class action over individual actions. The Court's findings of fact necessarily follow the backdrop of the statutory requirements for class certification.

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[1] Exhibit numbers are references to exhibits introduced into evidence at the certification hearing unless otherwise indicated.

7. *Numerosity.* Amoco has conceded the issue of numerosity in its answers to interrogatories. *See* Plaintiff's Exhibits *2VV* and *2WW*.) Furthermore, Amoco's witnesses testified that the numinber of non-operator putative class members is over 2,700. (*See also* Plaintiff's Exhibit *6Q* which is a current list of non-operators.) The Court finds that this evidence confirms that the class is so numerous that joinder of all members is impracticable.

8. *Common questions of law or fact.* To show commonality of law or fact in the claims of the class members, Lobo presented the testimony of its accounting expert, Barbara Ley, and Amoco's business records obtained through discovery.

9. Lobo's [sic] alleges that Amoco is billing items as direct costs which are also included in the Combined Fixed Rate ("CFR") overhead charge such that Amoco is double billing, "double dipping" [2] and double collecting many millions of dollars from non-operators each year. (*See* Plaintiff's Exhibit *2AA*.) Lobo alleges that Amoco is knowingly and intentionally double billing its working interest owners. Lobo further alleges the Amoco billing scheme was the result of substantial prior planning by Amoco management and that management continued perpetrating the billing scheme despite numerous warnings from Amoco's employees that such double billing practices were improper.

10. Lobo contends that in June of 1983, the first phase of Amoco's plan to double bill the joint account was implemented.[3] (*See* Plaintiff's Exhibit *2X*.) There

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[2] "Double Dipping" is a term used by Amoco's own employees in memoranda to management warning them that Amoco's billing practices are improper. *See* Plaintiff's Exhibits *8K* and *8M*.

[3] The testimony of Amoco's witnesses confirmed that Amoco, in 1983, began billing as direct charges items which never had been

are three principal areas which Lobo contends Amoco utilized FLACS to make improper charges: (1) allocation of Operation Center or district type charges; (2) allocation of charges for supervision above first level; and (3) allocation of charges for off-site technical employees (collectively referred to as "Disputed Charges").

11. Amoco's business records indicate that Amoco's accounting department had advised management that Amoco was double billing the joint account for items which previously had been absorbed in overhead and are covered by the CFR, and that Amoco had a strong economic incentive to do so. (*See* Plaintiff's Exhibits *2AA*, *2KK*, *2OO* and related exhibits cited therein.)

12. The Court finds that Amoco's billing practices, accounting system and accounting procedures for oil and gas operated properties in the United States are centralized in Tulsa, Oklahoma. (*See* Plaintiff's Exhibits *2CC* and *2SS*.) The Court further finds that charges to working interest owners nationwide are gathered in Amoco's nationwide accounting facility in Tulsa, Oklahoma, where they are then uniformly and systematically allocated to the joint accounts. The joint interest bills are then generated in Amoco's Tulsa office and mailed to the putative class members throughout the nation. Amoco did not dispute that Tulsa, Oklahoma, is the center of Amoco's accounting and billing activities nationwide.

13. The Court finds that Amoco's accounting personnel in Tulsa designed the billing system and trained Amoco employees across the country to assure uniform compliance with the Amoco coding procedures. Although the coding of charges may be performed at various levels

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billed as a direct expense and had always been "absorbed" by Amoco and charged to district expense. (*See* Defendant's Exhibit 63.)

from field personnel to division personnel to accounting personnel, all of the coding is required to be performed in accordance with the training manuals, instructions and policies formulated by Amoco's accounting center in Tulsa, Oklahoma. (*See* Plaintiff's Exhibits *2RR, 6N, 6O* and *8H.*) Amoco failed to convince the Court that an individual analysis would have to be done on each individual charge. Amoco's witnesses testified that if the Disputed Charges were determined to be improper as a whole (as is alleged by Lobo), they could be reversed at the Operation Center and/or FLACS level and that an individual analysis would not be required. Amoco employee, Jim Shearrer, testified that computer data existed within Amoco's computer system that would allow Amoco to reverse the disputed charges throughout the contested time period from 1983 forward for all persons who were billed such charges, and that Amoco had performed nationwide modification of charges on some issues in the past.

14. The Court finds that Amoco itself treats the class members as a class each and every month when it uniformly and systematically bills the class members for the same types of allocated charges through FLACS from its Tulsa, Oklahoma, offices. The Court finds it compelling that although Amoco now denies commonality and typicality, when Amoco responded to Barbara Ley's written audit exception letter dated July 24, 1996,[4] Amoco ad-

[4] Amoco asserted that Lobo never made a written audit exception to the Disputed Charges and, therefore, Lobo had no claim because it failed to comply with the audit provision of the accounting procedure which was a condition precedent to filing suit. Amoco also asserted that the audit provision, which Amoco's witnesses testified are standard in all agreements, is a form of alternative dispute resolution and binding arbitration. Amoco offered no authority for this proposition. The Court finds for purposes of class certification that the audit provisions are *not* a form of alternative

mitted Lobo's commonality and typicality with working interest owners throughout the nation, stating "We [Amoco] have approximately 60 audits performed on Amoco operated properties each year, all of which receive charges in the same manner and using the same systems as those used to generate charges to this [Lobo's] unit." (Plaintiff's Exhibit *6H*, *6I* and *2CC*.)

15. When working interest owners questioned charges on joint interest bills for indirect and overhead items being billed through Operating Centers and lease supervision, Amoco witnesses testified that Amoco issued standard form responses to the working interest owners which gave uniform explanations of the charges without regard to the various operating agreements or accounting procedures involved. Amoco's testimony further confirms the Court's finding that Amoco treats the class members uniformly with respect to the treatment of the Disputed Charges regardless of the form of agreement.

16. Much testimony at the hearing on certification dealt with the history of different form agreements. The development of form agreements governing accounting procedures in connection with oil and gas operations throughout the nation began in approximately 1949 with the PASO 1949 accounting procedure promulgated by the Petroleum Accountants Society of Oklahoma. A subsequent similar version was promulgated by PASO in 1955. Two general categories of charges were identified in the PASO agreements, direct and indirect charges. Direct charges were those which occurred at the "lease

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dispute resolution or binding arbitration. The Court also finds for purposes of class certification that a written audit exception is not a prerequisite to filing suit. Furthermore, Ms. Ley's letter does appear to constitute a written audit exception; however, this is an issue that can be presented to the trier of fact after certification. (Plaintiff's Exhibit *6H*.)

level." Indirect charges were those that occurred above the "lease level." Direct charges included drilling rigs, drilling mud, rework rigs, pumpers, pipe, pumping units, tank batteries, separators, dog houses, compressors, and various other services, labor and materials provided at the lease level. Indirect expenses included camp and district expense, administrative overhead and warehousing. Camp and district expense was further broken down into items such as housing for field workers, district (field production) offices, sub-offices, production superintendents, small tools and supplies not allocable to a specific property, field administrative personnel, communications equipment, and various other functions which benefitted all of the wells within an area rather than being identifiable with specific individual wells. Administrative overhead included all office services not included within the district and camp expense, all administrative services, and all overhead functions. Warehousing expense included all costs of ownership, operation and maintenance of facilities for storage of goods and materials by the operator. Under the 1949 and 1955 PASO agreements the actual costs of camp and district expenses were accumulated by the operator and charged on an allocated basis to the owners of the properties served by the district and camps. Warehousing costs were charged on an agreed upon basis, and administrative overhead was charged on a fixed rate basis for each producing well each month.

17. In 1962 the Council of Petroleum Accountants Societies (COPAS), of which PASO was a member organization, issued a new form of accounting procedures which was recommended for use in oil and gas operations. The 1962 COPAS agreement provided an option for the operator to include district and camp expense and warehousing as part of the negotiated flat rate charge, rather than requiring the operator to accumulate the costs asso-

ciated with these items and allocate them to the wells served by the districts and warehouses. Under the 1962 COPAS agreement, rather than having a fixed rate for administrative overhead only, the cost associated with district and camp expense, administrative overhead and warehousing could all three be combined into a single fixed rate charge, called the "combined fixed rate."

18. In 1968, 1974 and 1984, COPAS issued updated accounting procedures for onshore oil and gas operations. All Amoco witnesses testified that the forms remained essentially the same as to the types of charges about which Lobo is complaining in this lawsuit. Under the 1962, 1968, 1974 and 1984 COPAS agreements district and camp and warehousing expenses were included with administrative overhead, and recovered through the combined fixed rate.

19. All witnesses who testified about the joint operating agreements (hereinafter "JOA's") testified that the provisions and interpretations of the various form agreements regarding the Disputed Charges, did not change appreciably over time. Amoco contended throughout the case that there were a number of different forms of JOA's and attached accounting procedures that would have to be dealt with separately on an individual case by case basis to resolve the issues in this case and that there was not a commonality of issues among owners under the various agreements. However, both Mr. Brill and Mr. Shearrer (Amoco employees) agreed that the accounting procedure attached to the JOA was the controlling document when determining chargeability of the Disputed Charges and that all of the accounting procedures allowed Amoco to bill the Disputed Charges. Mr. Brill explained that Amoco relied on only three clauses in the accounting procedures to determine if the Disputed Charges were properly billable, that these three provisions were sub-

stantially the same in all agreements and based thereon Amoco billed all agreements the same. Mr. Brill also testified that it was appropriate that Amoco look only at these three provisions to determine chargeability of the Disputed Charges and likewise it was appropriate for the Court to look only at those same three provisions to determine the chargeability of the Disputed Charges.

20. The complained of charges, for the most part, are various types of office expenses that Amoco claims are for its "field offices", which Amoco formerly called District and Sub-district Offices.

21. Amoco contends that the drafters of the PASO and COPAS form accounting procedures meant for field offices to be covered under the "other expenditures" provision of the form agreements. However, the administrative overhead provisions of the 1955 PASO agreement and the 1962 COPAS agreement specifically provide that administrative overhead covers all office expenses not included in the district and camp expense provisions. COPAS Bulletin 16 provides that, even though necessary for the proper performance of the job duties by directly chargeable personnel, costs such as office rent, supplies, utilities, maintenance, office staff, etc., are included in overhead. When questioned why the language of Bulletin 16, or any of the COPAS Bulletins, were contrary to their testimony, Amoco's witnesses stated that the literal words did not mean what they say, or "you're reading the words too closely." However, Amoco's internal documents reveal that, prior to this litigation being filed, Amoco internally acknowledged that under the literal wording of the COPAS 1962 form, Operation Center charges, and similar charges, are not proper charges to the joint account. (*See* Plaintiff's Exhibit *8N*.) Although the Court finds little credibility to Amoco's present argument, it does demonstrate the existence of factual issues common to all

members of the Class that can be resolved by the trier of fact following certification.

22. Amoco acknowledged in its business records and by testimony of its witnesses that Amoco's Operation Centers were Amoco's "Field Production Offices." "Field Production Offices" are addressed in the COPAS 1962 accounting procedure and are specifically defined as the "District Offices." COPAS Bulletin 16 (Revised in 1988) also defines "Field Production Offices" as "District Offices". Amoco's internal analysis of the accounting procedures reflects that the field production office and related district expenses are components of the CFR. (*See* Plaintiff's Exhibit *2J.*) When confronted with these documents, Amoco's witnesses attempted to justify the billing of Operation Centers by stating that when the 1962 forms were executed, field offices were small and insignificant in expense and thus were included in the CFR; however, as the field offices became larger and more costly their expenses became billable. Although the Court finds little credibility in Amoco's argument, it does demonstrate the existence of a factual issue common to all members of the Class that can be resolved by the trier of fact following certification.

23. Amoco further sought to justify the billing of Operation Centers by asserting that only field type personnel (directly chargeable people) were located in the Operation Centers. Brad Brill testified that Amoco had moved all of the administrative type people and engineers out of the Operation Centers, and that only field type people remained in the Operation Centers. However, Jim Shearrer testified that engineers and administrative people are still located in the Operation Centers. (*See also* Plaintiff's Exhibit *2HH, 6C, 7J, 7K, 7L, 7M, 8G* and *8H* and Defendant's Exhibit 63.) Although the Court finds little credibility in Amoco's position, it does demonstrate the

existence of a factual issue common to all members of the Class that can be resolved by the trier of fact following certification.

24. The Court finds that Lobo's position that the costs of field offices, office personnel and offices expenses are recoverable only through the combined fixed rate and are not chargeable as direct expenses is consistent with the evidence of the history of the combined fixed rate, with Amoco's treatment of these costs prior to 1983, and with the COPAS Bulletins discussing the charges included in the combined fixed rate. The position of Amoco's expert and its employees that these costs are chargeable as direct expenses and are not included in the combined fixed rate is not supported by the overwhelming weight of the evidence introduced at the certification hearing.[5] Nonetheless, the opposing evidence submitted by the parties on these issues clearly demonstrates that there exists a common nucleus of operative facts in this case and that there are questions of fact which are common to the members of the Class and the defenses of Amoco which can be resolved by the trier of fact in a class action.

25. Other items routinely included in the Operating Centers and/or FLACS's and allocated to the non-operating working interest owners as direct expenses, are small tools and supplies. It appears the COPAS agreements and bulletins specifically provide that small tools and supplies which are not chargeable to specific properties are included in overhead. Amoco employee Jim

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[5] The Court finds substantial evidence to support Lobo's contention that Amoco ignores the language of the form agreements, the COPAS Bulletins which Amoco's witnesses described as its Bible (*See also* Plaintiff's Exhibit 20), the one agreed authoritative text on the subject (JOHN JOLLY AND JIM BUCK, Joint Interest Accounting Petroleum Industry Practice (1988)), and Amoco's internal documentation which warned Amoco management it was billing improperly.

Shearrer testified that Amoco routinely bills the joint account for allocated small tools through the DOS ("District Operating Supplies") account, despite the contrary COPAS provisions. This demonstrates the existence of a factual issue common to all members of the Class that can be resolved by the trier of fact following certification.

26. The evidence at the certification hearing was that Amoco uniformly and routinely billed Operations Foremen across the country as direct charges to the joint properties. (*See* Plaintiff's Exhibits *2FF* and *2HH*.) Amoco's Guidebook of Joint Account Charges, which was prepared by Amoco's Accounting Department in Tulsa, reveals that a "typical" organization chart has three levels of supervision. (*See* Plaintiff's Exhibit *2FF*.) Furthermore, Amoco's internal business records reflect that Amoco is consistent across the United States in billing various levels of supervision to members of the Class. (*See* Plaintiff's Exhibit *8H*.)

27. The agreements and COPAS Bulletins specifically provide for the billing of first level supervision as a direct expense. Amoco's internal documents reveal the Operations Foremen are second or third level supervisors. (*See* Plaintiff's Exhibits *2FF, 2HH, 2II, 8A, 8C*, and other exhibits.) Although the Court finds the testimony of Amoco's witnesses to have little credibility with respect to Amoco's basis for the billing of salaries, benefits and expenses for several levels of supervision to the joint account, it does demonstrate the existence of factual issues common to all members of the Class that can be resolved by the trier of fact following certification.

28. The Court finds that the alleged wrongful charges billed to the class members can be identified on a class-wide basis with relative ease. Reversal of improper charges that are complained of in this lawsuit can be accomplished by reviewing only a limited number of ac-

counts and reversing the charges from those accounts if Lobo prevails on the merits.

29. The Court finds the witnesses produced by Amoco to defeat certification did more to support Lobo's position that Amoco ignores the terms of the agreements, that Amoco treats the non-operaing working interest owners as a class for billing purposes, and that Amoco double bills the non-operating working interest owners as a class for overhead expenses through the use of Operation Centers and/or FLACS accounts, than to support Amoco's positions to the contrary.

30. The Court finds that there is sufficient basis upon which to conclude that Amoco engaged in a common course of conduct with respect to the plaintiff class. The proof Lobo will need to adduce in this class action to prove its individual claims will be similar to or the same as the proof that the absent class members would need to adduce if they brought individual lawsuits against Amoco.

31. The Court finds that Amoco's contention that the language of the estimated 5,900 to 7,000 contracts and the actions of approximately 2,700 non-operating working interest owners needs to be examined on an individual basis is not supported by the evidence of even its own witnesses.

32. Given that there exists a common nucleus of operative facts in this case, it follows that the Court can and does find that there are questions of law or fact common to the members of the class, and that the common questions will predominate over any questions affecting only individual members.

33. *Typicality*, Lobo's claims as a whole are typical of the claims of the class. Lobo is an average or above average sized independent producer who is or was a non-

operating working interest owner in wells that were operated by Amoco. Lobo received allegedly fraudulent charges which were allocated to and shared with other class members. These Disputed Charges were of a type charged to class members across the nation, which individually were relatively small, but cumulatively, on a nationwide basis, amounted to large sums of money. The Disputed Charges were for items such as office expenses, supplies, office parties, office equipment, multilevel supervision and other items which Lobo contends were covered by fixed rate overhead charges, but which were billed a second time to the class members as direct charges. The Disputed Charges were placed in allocation accounts called FLACS. Ms. Ley testified such FLACS are composed of Disputed Charges which can only be legitimately recovered through the combined fixed rate, but which Amoco billed the Class a second time as direct expenses. The Disputed Charges were uniformly allocated and billed to the Class and can be uniformly reversed if Lobo prevails on the merits.

34. The Court does not find persuasive Amoco's argument that Lobo is not typical because they did not an own interest in Amoco operated properties in states other than Oklahoma. Amoco argued that the typicality requirement, like the commonality requirement, was destroyed by the existence of multiple agreements over extended time periods and expansive geographic area. The evidence at the hearing, however, was that Amoco uniformly billed indirect expenses through a uniform accounting system that allocated the expenses to all wells within production areas across the United States without differentiation due to different agreements on the properties. Amoco's witnesses repeatedly testified that Amoco had determined that the complained of charges should be treated uniformly as to all properties and all agreements.

35. *Adequacy of Representation.* The Court finds that the representative Lobo, and Lobo's counsel, will fairly and adequately protect the interests of the Class. Hugh Tullos, general counsel for Lobo, testified that Lobo had made arrangements to vigorously pursue the class action on behalf of all members of the Class to its conclusion and that Lobo would take all necessary actions to assure that the Class would receive fair and adequate representation in all respects. Adequacy of representation was further supported by the affidavits of Allan DeVore and Lobo's president, Robert L. Ham, filed with the motion for class certification. No evidence was presented to controvert Lobo's contention that Lobo's counsel was competent and had substantial experience in conducting complex oil and gas business litigation. Based on the Court's observations of Lobo's counsel in previous proceedings before this Court, in this matter and other matters, the Court finds that counsel for Lobo are well qualified to prosecute this class action.

36. Although Amoco did assert that Lobo's counsel had a conflict with Conoco Inc.. the Court finds that the requested definition of the Class clearly excludes those who have legal conflicts with class counsel. Amoco presented no other evidence of a true conflict. Amoco's argument that some class members may be doing similar acts does not diminish the fact that Lobo's counsel would be furthering such a class member's claims against Amoco. If such a class member does not want his claim furthered against Amoco, the putative class member will be provided the opportunity to opt out of the class.

37. *Superiority of class action over individual claims.* The court finds that a class action is superior to any other available method for a fair and efficient adjudication of

this controversy.[6] A class action will provide an economically viable remedy to the class members. The claimed wrongful charges to the individual working interest owners are relatively small, but cumulatively, on a nationwide basis could amount to many millions of dollars. Individual pursuit of the claims of Lobo, like that of the majority of the class members, could not be financially justified and would result in the inability of the members of the class to seek an adequate legal remedy.

CONCLUSIONS OF LAW

THE STANDARD FOR CERTIFICATION

1. The Court has broad discretion in determining whether a class should be certified. *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982). The Court may modify its ruling granting certification later if justice mandates and therefore, courts are liberal in certifying a class. "[R]ule [23][7] must be liberally construed with a view to enhancing the use of class actions as a means of vindicating rights of absent members who are unable, for one reason or another, personally to prosecute." *Berland v. Mack*, 48 F.R.D. 121, 125 (S.D. NY. 1969). See also, *King v. Kansas City Southern Industries*

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[6] The Court finds the evidence does not support Amoco's position that the audit process is a superior method to resolve this controversy. The testimony revealed that to resolve this controversy through the audit process would require Class members to perform approximately 3,500 audits per year in Tulsa, Oklahoma. Amoco witnesses testified that Amoco's audit capacity was less than 100 audits per year. Clearly, one class action which resolves the issues is superior to 3,500 audits per year which may document the issues yet not resolve them.

[7] Because Oklahoma's class action statute "closely parallels that provided in Rule 23 of the Federal Rules of Civil Procedure, it is appropriate to consider federal authority for guidance and enlightenment as to its rationale." *Shores v. First City Bank Com.*, 689 P.2d 299, 301 (Okla. 1984).

Inc., 519 F.2d 20, 25-26 (7th Cir. 1975). Any doubt regarding the proprietary of certification should be resolved in favor of, and not against, the maintenance of the class so that it will remain an effective vehicle for deterring corporate wrongdoing. *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968) *cert. denied* 394 U.S. 928. See also, *Cook v. Rockwell International Corp.*, 151 F.R.D. 378, 381 (D.C. Colo. 1993); *Joseph v. General Motors Corp.*, 109 F.R.D. 635, 638 (D.C. Colo. 1986).

2. Although Lobo must do more than simply make conclusory, legal allegations that the requirements of § 2023 have been met, it is not required to prove a *prima facie* case in order to be certified as a class. Lobo must, in essence, provide a factual backdrop which would support certification. *Life Ins. Co. of Southwest v. Brister*, 722 S.W.2d 764 (Ct. App. Tx. 1986); *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 571-72 (2nd Cir. 1982) *cert. denied* 459 U.S. 838 (1982).

LOBO HAS MET ITS BURDEN UNDER 12 OKLA. STAT. § 2023

Numerosity

3. Class certification will achieve the remedial purpose of 12 O.S. § 2023. The class certification device saves resources of all parties and the Court, by permitting the adjudication of issues potentially affecting many plaintiffs in a unified, economical fashion. *Califano v. Yamasaki*, 442 U.S. 682, 690, 99 S.Ct. 2545, 2552 (1979).

4. Lobo has shown that the class will potentially consist of over 2700 working interest owners. Amoco does not contest the numerosity element. The Court concludes that class treatment is far superior to 2,700 individual lawsuits and that it would be impracticable, if not impos-

sible, to join all members of the proposed class in the suit.

Commonality

5. Lobo has shown that many questions of fact and law exist that are common to the class members, as is required in Okla. Stat. tit. 12 § 2023(a)(2). (*See* Plaintiff's Exhibit 10*D*.)

6. 12 Okla. Stat. § 2023(a)(2) requires that there be a common question of law or fact. Application of this prerequisite does not command that all questions of law or fact be identical among all members of the class, but instead that at least one issue raised is common to all class members. *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87 (S.D. N.Y. 1981); *Halford v Goodyear Tire & Rubber Co.*, 161 F.RD. 13 (W.D. N.Y. 1995); *Weiss v. York Hospital*, 745 F.2d 786, 809 (3rd Cir. 1984) *cert. denied*, 470 U.S. 1060 (1985). "If there is a common issue, irrespective of whether it is dispositive of the case, this requirement is met." *Davis v. Northside Realty Association*, 95 F.R.D. 39, 43 (N.D. Ga. 1982). "Notwithstanding the fact that class members may have different individual situations and circumstances," if their claims are derived from "a common nucleus of operative facts" they satisfy the requirement. *McEwen v. Digitran Systems, Inc.*, 160 F.R.D. 631, 636 (D.C. Utah 1994).

7. The findings that there is a common nucleus of operative facts; that there were commonly applied contract interpretations by Amoco; and that Amoco treated all the Class members the same when it uniformly and systematically billed the Class members for the same types of allocated charges through FLACS from its Tulsa, Oklahoma offices, are among the findings upon which the Court concludes that the commonality requirement has been met.

8. As its major opposition to class certification, Amoco contends that differences among the class members may result in individualized issues which may control the litigation. Particularly, with respect to limitations issues and fraud claims, Amoco maintains that individual inquiries must be made as to the circumstances surrounding the factual or legal bases for such defenses and claims. For reasons set forth in the following paragraphs, the Court concludes that common issues will predominate over questions affecting only individual members of the class.

A. *Breach of contract claims.* Breach of contract claims are appropriate for class action treatment. Oklahoma courts have upheld the certification of breach of contract claims as class actions. In *Handley v. Santa Fe Minerals, Inc.*, 849 P.2d 433 (Okla. App. 1992), the Oklahoma Court of Appeals concluded that a class action was properly certified even though the class members had entered into separate lease contracts with the defendants. The Oklahoma Supreme Court approved a class action in a contract case involving mineral lessors in *Hall Jones Oil Corp. v. Claro*, 459 P.2d 858 (Okla. 1969). Also, in *MacNeal v. Columbine Exploration Corp.*, 123 F.R.D. 181 (E.D. Pa. 1988), the court held that the working interest owner class representatives could pursue an action for accounting on behalf of all working interest owners, despite the fact that separate operating agreements covered the wells, because the defendant's conduct affected all class members alike.

B. Claims arising from the interpretation of form contracts are routinely certified, even when the claims of the class are based on different contracts, so long as the relevant contractual provisions raise common questions of law or fact and do not differ materially. *Kleiner v. First National Bank of Atlanta*, 97 F.R.D. 683, 692 (N. D. Ga. 1983) and *Janicik v. Prudential Ins. Co. of America*,

451 A.2d 451, 457 (Penn. 1982). The testimony of Amoco's witnesses at the certification hearing that the complained of charges were properly billed and allocated in the same manner, regardless of the form agreement in place; that Amoco justifies this uniform billing practice by reliance on three clauses in the various accounting procedures, which do not materially differ from agreement to agreement; that by virtue of the uniformity of these clauses from agreement to agreement, Amoco has standardized responses to audit exceptions without regard to the form of the agreement; and that it would be appropriate for the Court to rely upon these same three clauses in determining the chargeability of the Disputed Charges, further supports the Court's finding that the commonality requirement is met. (*See also* Plaintiff's Exhibit 2*BB*, 2*CC*, 2*DD*, 2*EE*, 2*FF*, 8*G*, 8*H*, 8*I*, and 8*J*.)

C. Other cases granting certification in breach of contract cases include *Ingram v. Joe Conrad Chevrolet Inc.*, 90 F.R.D. 129 (E.D. Ken. 1981) where the court held that an action brought on behalf of a class of consumers who purchased automobiles in a credit transaction financed through the defendant creditor using a contact [sic] substantially similar to the one used by the named party would be certified. In *Seeco, Inc. v. Hales*, 954 S.W.2d 234 (Ark. 1997) royalty owners brought a class action against defendants seeking unpaid royalties. The plaintiffs asserted claims for breach of contract, fraud, violation of statutes, conspiracy, and tortious interference with contractual relations. The defendants argued that the issues could only be resolved individually because of the different forms of leases and the differing bases for determining royalties. The trial court found that the evidence the plaintiffs presented indicated:

> [A]n alleged overall scheme and course of conduct by the defendants designed to defraud the members of

> the proposed class as a group irrespective of the type of oil and gas lease or the volume of production from the leases.

Id. at 237. The Arkansas Supreme Court agreed with the trial court and held:

> What is alleged in the case at hand is a single course of fraudulent conduct perpetrated by the appellants and directed at the royalty owners, with each plaintiff depending on the same facts and legal arguments for recovery. The issue of a fraudulent scheme is central to the instant case and a common starting point for all class members.

Id. at 240. In *Jennings Oil Co. Inc., v. Mobil Oil Corp.*, 80 F.R.D. 124 (S.D. N.Y. 1978) the plaintiffs, three independent distributors of Mobil products, sued Mobil, on behalf of all distributors of Mobil products nationwide, claiming Mobil engaged in a conspiracy to eliminate independent Mobil distributors from competing in the wholesale distribution of Mobil gasoline. In granting certification the court said:

> The plaintiffs are seeking relief for common grievances from a common nucleus of facts. They claim Mobil has engaged in a nationwide conspiracy to eliminate independent Mobil distributors from competing in the wholesale distribution of Mobil gasoline.
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> * * *
>
> "The common threads running through each class member's claim are whether defendant unlawfully conspired to restrain trade or willfully overcharged its customers. These questions clearly predominate over individual questions." (Quoting *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109 (S.D. N.Y. 1975). See also, *Bryan v. Amrep Corp.*, 429 F.Supp. 313, 319 (S.D. N.Y. 1977).) "The existence of a common

> plan, pursuant to which a common course of conduct occurred, is a class issue."

Id. at 129. In *Lewis v. Texaco Exploration and Production Co., Inc.*, 698 So.2d 1001, 1006 (La. App. 1997), the issue on appeal was: "Is the class certification improper when the plaintiffs' claims arise from separate contracts with the defendant (i.e., their mineral leases), where those contracts were written on different forms and have different royalty provisions?" The court held certification was proper. In so holding the court said:

> In the instant case, the representative plaintiffs are mineral royalty owners and are similarly situated to the absent members of the class. The claims of the representative claimants are typical of the claims of the absent class members; they are small claims for royalties and damages which cannot be economically litigated on an individual basis. All claims arise out of Texaco's alleged liability for royalties and damages. . . .

Id. at 1013. The court in *Lewis* also noted that any potential class member who was not satisfied with the relief sought by the representative plaintiffs could exclude himself from the class. The fact that individual class members may be entitled to varying damages did not defeat certification said the court in *Lewis*. The court in *Lewis* was aware that,

> [w]ithout a procedural device, such as a class action, a large group of litigants with predominately small claims would not be able to pursue effectively an action of the type before us.

Id. at 1014.

D. *Fraud claims.* The Oklahoma Statutes provide an indication that fraud claims in a case such as this are

appropriate for class maintenance. *See*, for example, 76 O.S. § 4, "One who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit."

E. A class may be maintained in Oklahoma for deceit. *Dane v. Southwestern Bell Telephone Co.*, 352 F.Supp. 257 (W.D. Okla. 1972); *Hall Jones Oil Corp. v. Claro*, 459 P.2d 858 (Okla. 1969); *Young v. West Edmond Hunton Lime Unit*, 275 P.2d 304 (Okla. 1954).

F. Amoco's reliance on *Bunch v. K-Mart Corporation*, 898 P.2d 170 (Okla. App. 1995), *cert. denied*, June 8, 1995, is misplaced and not persuasive to the Court because of significant distinctions. In *Bunch* the plaintiffs defined the class as all persons who were damaged as a result of oral representations by K-Mart personnel that automotive parts or service were needed when they actually were not needed. First, there would be no way of knowing which customers in the alleged class were told that they needed parts or service. Second, there would be no way to know which customers authorized parts or service based on the statements by the K-Mart personnel. Finally, there was no way to know which customers did not receive the parts or service they had approved or received parts or service that they did not need. In the present case, as opposed to the situation in *Bunch*, the representations to the class members regarding accounting procedures and/or joint interest billings were written, standardized and are readily identified. The allegedly fraudulent billing was performed consistently, on a monthly basis, using a single, computerized billing system from one location in Tulsa, Oklahoma. (*See* Plaintiff's Exhibit 2*RR*.) Charges were allocated to working interest owners over wide geographic areas in accordance with standardized procedures, supported by documentary evi-

dence and testimony from Amoco's witnesses, all of which allow the representative plaintiff to demonstrate the commonality and typicality of Amoco's wrongful conduct and the harm to the class members. "The need to show individual reliance has not precluded class treatment in cases where standardized written misrepresentations have been made to the class members." Newberg on Class Actions (3rd), § 22.47.[8]

G. The case of *Dresser Industries, Inc. v. Snell,* 847 S.W.2d 367 (Ct. App. Tx. 1993), is another example of a fraud case that was certified as a class action. In *Dresser* the plaintiffs alleged that the defendants committed fraud, negligence, and gross negligence during the servicing of 523 oil wells. The plaintiffs alleged that the defendants engaged in a systematic shorting scheme which involved cheating on the material used to service the well. The plaintiffs claimed there was a serious difference between the materials agreed to be used to perform the servicing and the materials actually used. The court stated:

> Defendants first argue that the claims necessarily arose from conduct that varied from well to well and job to job, destroying the typicality of the class representatives' claims. This argument fails for the following reasons.
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> The class representatives of all own royalty, or overriding royalty interests in one or more of the 523 wells. Their claims all stem from the same systematic shorting scheme in servicing the wells, which a

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[8] "Defendants may raise non-reliance as an affirmative defense at trial but it is inappropriate to raise non-reliance at the certification stage because entry into the intricacies of reliance goes to the merits of the case and cannot be considered by the court on a certification motion." *Gorsey v. I.M. Simon & Co.,* 121 F.R.D. 135, 138 (D.Mass. 1988.)

> number of defendants' employees witnessed and documented. The claims are all based upon identical tort theories of common-law fraud, negligence and gross negligence. The plaintiffs all seek money damages in tort.

Id. at 372 and 373.

H. Courts have certified cases as class actions where the plaintiffs have alleged that the defendants used various accounting maneuvers and billing schemes to improperly bill class members. In *Arenson v. Whitehall Convalescent & Nursing Home, Inc.*, 164 F.R.D. 659 (N.D. Ill. 1996) the court certified a class of nursing home residents that had received inflated and fraudulent bills from the defendants. In *In re Memorex Security Cases*, 61 F.R.D. 88 (N.D. Calif. 1973) the court certified a class action based upon allegations that the defendants had used an accounting methodology that had mislead the investing public as to the corporate earnings and had artificially inflated the value of the defendant's stock. In *Davis v. Northside Realty Associates, Inc.*, 95 F.R.D. 39 (N.D. Ga. 1982) the court certified a conspiracy scheme alleging illegal overcharges. A recent Oklahoma case has likewise held that a class action was appropriate where electricity rate payers alleged the defendants were parties to "accounting maneuvers" which "hid" the reason for the increase in the plaintiffs' fuel bills. *Hargrave v. Canadian Valley Electric Co-op. Inc.*, 792 P.2d 50 (Okla. 1990).

I. The Advisory Committee's Notes to Fed.R.Civ.P. 23, 39 F.R.D. 98, 103 (1966) provides that:

> [A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate

> determinations of damages suffered by individuals within the class. *Id.* at 103.

The Court finds that Amoco's alleged accounting scheme that disguises indirect and overhead charges, and improperly and fraudulently bills them to the class members as direct charges is a common issue to the class.[9]

J. Whether or not there may have been variations or differences in the kinds or degrees of representations and reliance by individual working interest owners is, at this stage of this proceeding, speculation. Such issues are appropriately addressed on the merits of the case, rather than the certification stage. The Court finds the case of *Zeigler v. Gibraltar Life Insurance Company of America,* 43 F.R.D. 169 (D. S.D. 1967), particularly applicable. In that case, the Court said:

> Defendant contends that there may be variations in the representations made or differences in the kinds or degrees of reliance by the minority stockholders. Such allegations, however, are matters of complete speculation. If this court were to deny plaintiff's motion for that reason alone, it may very well be defeating the primary purpose for which Rule 23 was enacted, for it would seem just as conceivable that it later be deduced that the representations made and the kinds and degrees of reliance thereon were, for

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[9] The Court finds it significant that Amoco employees Jim Shearrer and Brad Brill testified that a) Amoco sends out its invoices knowing that Amoco is required to bill only for those charges allowed by the accounting procedures; b) Amoco expects the class members to trust Amoco to only bill for charges allowed by the accounting procedures; c) the class members did trust Amoco to properly bill them; d) based upon their trust and reliance, the class members paid Amoco's invoices; and e) if the class members paid for wrongful charges, then they have been damaged. In light of the other evidence presented, this testimony provides a sufficient basis for the Court to conclude that Lobo's fraud claim is common with the Class and should be certified as a class action for a determination on the merits.

all intents and purposes, essentially synonymous. If, however, it be found that the representations and reliance thereon be so varied as to make it impracticable to proceed further, this court can enter an order requiring that the "pleadings be amended to eliminate therefrom allegations as to representation of absent persons" and direct that any further proceedings be on "behalf of the named plaintiffs alone." *Id.* at 172.

K. *Unjust Enrichment And Accounting Claims.* The Court does not accept Amoco's argument that unjust enrichment and accounting claims by their very nature are not suitable for class action treatment. If specific causes of action were meant to be excluded from class certification, 12 Okla. Stat. § 2023 would so provide. Accounting actions, including oil and gas related claims, have been recognized as being appropriate for class certification. See *Harding v. Cameron,* 220 F.Supp. 466 (W.D. Okla. 1963) (class action for accounting for oil and gas produced from leases); and *MacNeal v. Columbine Exploration,* 123 F.R.D. 181 (E.D. Pa. 1988) (class action for funds paid to and used by the operator of wells). The evidence does not support Amoco's assertion that Amoco was not making a profit on operations, and thus could not be unjustly enriched at the expense of the Class. (*See* Plaintiff's Exhibit 2*QQ*.) It is the collection of money to which Amoco is not entitled that would result in unjust enrichment. The profitability or unprofitability of performing the services of operator under the agreed compensation provisions is immaterial.[10]

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[10] Amoco's corporate representative, Paul Gregory, testified as follows: The concept that an operator is to neither profit nor lose money as a result of operations is a concept to be applied at the time the CFR is negotiated. Once it is negotiated, the operator must live by the agreement. If operations become unprofitable, the operator can renegotiate the CFR or resign as operator. The concept does not allow the operator to double bill the joint account

L. *Oklahoma Consumer Protection Act.* The Court also rejects Amoco's argument that the Oklahoma Consumer Protection Act does not apply to a class action alleging a fraudulent billing scheme. The Oklahoma CPA, by definition, specifically applies to business transactions and to individuals such as the plaintiffs and the class members.[11]

M. The Oklahoma CPA was written to protect people like the members of the class.[12] There is no reason why class members nationwide cannot apply an Oklahoma law to corporations doing business in the state, particularly when the business acts that allegedly violated the statute were conducted in this state.

N. Other courts have certified class actions alleging violations of consumer fraud acts. In *Martin v. Heinold Commodities*, 510 N.E. 2d 840 (Ill. 1987), *later opinion*, 643 N.E. 2d 734 (1994), a class action was brought against an Illinois business by an Oklahoma resident, on

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even if the operator may be losing money as a result of being operator. When Amoco finds itself in a position of losing money as a result of being operator, Amoco often chooses not to resign as operator due to other benefits it derives from being the operator.

11 The Oklahoma CPA applies to any person, corporation or any other legal entity. The Act prohibits a corporation, in the course of business, from committing an unfair deceptive trade practice. Deceptive trade practice means a misrepresentation or omission that has deceived or could reasonably be expected to deceive or mislead. An unfair trade practice includes practices that are substantially injurious to consumers. Reliance is not an [sic] requirement under the Oklahoma Consumer Protection Act. 15 Okla. Stat. § 752 et seq.

12 The Act includes in its definition of a consumer transaction the distribution of any service for purposes that are business oriented. Amoco contends that the operator of a well does not provide a service to the non-operators, but merely obtains reimbursement for the costs it has incurred on behalf of the joint account in connection with operating the wells. Lobo presented evidence to the contrary. (*See* Plaintiff's Exhibit *4A* through *4U*.) The Court finds this is yet another factual issue common to all members of the Class that can be resolved by the trier of fact after certification.

behalf of a nationwide class, alleging violation of the Illinois Consumer Fraud Act. The plaintiff alleged that the defendant engaged in unfair and deceptive practices in connection with futures transactions. The court held that the Illinois Consumer Fraud Act would be applied to all members of the class because Illinois had a substantial interest in making companies conduct business in the state comply with the state's laws. This same principle has been consistently applied, including decisions from courts in Arizona,[13] California,[14] Florida,[15] Maryland,[16] New Jersey,[17] North Carolina,[18] Ohio,[19] South Carolina[20] and Texas.[21]

---

[13] *State ex rel. Corbin v. Pickrell*, 667 P.2d 1304 (1983) (Arizona law could be applied to conduct by a local business against out-of-state residents).

[14] *In re Computer Memories Securities Litigation*, 111 F.R.D. 675, 686 (N.D. Cal. 1986) (California law could be applied to entire class in nationwide securities fraud case where defendant was a California corporation, acts complained of emanated from California, and money collected went to California.

[15] *Barnebey v. E.F. Hutton & Co.*, 715 F.Supp. 1512, 1535-36 (M.D. Fla. 1989).

[16] *In re Kirschner Medical Corp. Securities Litigation*, 139 F.R.D. 74 (D. Md. 1991).

[17] *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397 (D.N.J. 1990).

[18] *Simms Investment Co. v. E.F. Hutton & Co.*, 699 F.Supp. 543, 545-46 (M.D.N.C. 1988).

[19] *Brown v. Market Dev., Inc.*, 322 N.E.2d 367, 369 (1974) (Ohio UDAP statute is intended to prohibit, and to provide civil remedies to enforce the prohibitions of, deceptive and unconscionable acts and practices by Ohio suppliers in connection with consumer transactions, irrespective of the location of the consumer, whether within or without Ohio.)

[20] *South Carolina Nat'l. Bank v. Stone*, 139 F.R.D. 325, 334 (D.S.C. 1991).

[21] *Rio Grande Oil Co. v. State*, 539 S.W.2d 917 (Tex. Civ. App. 1976).

O. As more fully addressed hereafter, Oklahoma has significant contacts and aggregation of contacts to the claims asserted by each class member to create sufficient state interests to ensure that the application of Oklahoma law is not arbitrary, unfair or in violation of due process.

P. The existence of issues relating to limitations and the tolling of statutes of limitation, is not a bar to class certification. *Shores v. First City Bank Corp.*, 689 P.2d 199 (Okla. 1984); *Newberg on Class Actions*, Section 4.26 (3rd Ed.).

9. The Court finds that Lobo has satisfied the requirement of showing a common question of fact or law.

10. *Typicality*. Lobo has satisfied the third requirement for class certification, that its claims are typical of the claims of the class. 12 O.S. § 2023(a)(3). A representative plaintiff must show the existence of a nexus between the class representative's claims and the common questions of law or fact that unite the class. This nexus is satisfied if the representative advances claims based on the same event or practice and the same legal theories. Factual variations between the individual member's claims will not defeat typicality. *Kornberg v. Carnival Cruse Lines, Inc.*, 741 F.2d 1332 (11th Cir. 1984) *cert. denied*, 470 U.S. 1004 (1985).

11. In this case, Lobo's claims arise out of the same events and course of conduct that produced the class members' claims. The claims of all class members are based on the same legal theories as are those claims of Lobo.

12. Courts considering the typicality issue have consistently held that plaintiff's claims meet the typicality requirement if they arise from the same practice or course of conduct. The Court finds that the claims of Lobo and the class members did arise from the same alleged practices and course of conduct of Amoco. The claims of

Lobo and the class members all arise from Amoco's allegedly improper and fraudulent billing practices with respect to the working interest owners in Amoco operated properties. The fact pattern is the same with respect to all class members, and the same legal theories are asserted on behalf of all. Accordingly, the typicality requirement has been satisfied. *In re Texas International Sec. Litig.*, 114 F.R.D. 33 (W.D. Okla. 1987); *In re Home-Stake Production Co. Sec. Litig.*, 76 F.R.D. 351, 365 n.7 (N.D. Okla. 1977).

13. *Adequacy of Representation.* Lobo must establish that "the representative parties will fairly and adequately protect the interests of the class." 12 O.S. § 2023(4). The Court concludes that Lobo has established this requirement.

14. Adequate representation depends upon two facts: (1) the attorneys of the class representative must be qualified, experienced and generally able to conduct the proposed litigation; and (2) the representative party must not have interests antagonistic to those of the class. *AM/COMM Systems v. American Tel. & Tel. Co.*, 101 F.R.D. 317 (E.D. Pa. 1984).

15. The cases and treatises which construe or provide opinion on Section 2023(a)(4) emphasize that absent class members must receive adequate representation, considering the competence of both the class representative and the counsel for the class representative. *7 Wright & Miller, Federal and Procedure*, Section 1765 (2nd Ed. 1986); *Handsbury v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940); *Skeet v. Sears Roebuck & Co.*, 137 F.R.D. 347 (D.C. Ken. 1991).

16. The Court concludes that Lobo is motivated by the desire to protect the rights and interests of the other class members.

17. The evidence at the hearing on certification did not reveal that Lobo has claims which are in any way antagonistic to the claims of the members of the proposed class.

18. The Court received the affidavit of Allan DeVore regarding counsel's experience and their ability and desire to prosecute this case to completion and heard the testimony of Lobo's representative, Hugh Tullos, to the same effect. This information, coupled with this Court's observation of the written material submitted by class counsel and of their courtroom skills, is sufficient from which this Court concludes that counsel are competent to provide class representation and pursue a case of this magnitude.

19. *Common questions of law or fact predominate.* Pursuant to 12 O.S. § 2023(b)(3), Lobo must demonstrate that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fair and efficient adjudication of the controversy. The Court concludes that this prerequisite has been satisfied.

20. Variations in damages will not defeat certification of a class action. *Ross v. A.H. Robbins Co.*, 607 F.2d 545 (2nd Cir. 1979), *cert. denied*, 446 U.S. 946, 100 S.Ct. 2175, 62 L.Ed.2d 802 (1980). The Court finds, and the evidence presented at the certification hearing supports the finding, that Amoco treated all the non-operating working interest owners the same with respect to the issues involved in this case, despite differing forms of agreements. The acts or omissions of Amoco which constitute the alleged breaches of contract and/or fraud, as well as the other causes of action pleaded by Lobo, are the same or similar acts or omissions for each class member. The Court concludes, therefore, that common

questions predominate where the acts or omissions are the same, even though damage amounts may vary. Advisory Committee's note to Rule 23(b)(3) (1976 amendment).

21. In determining whether common questions predominate over individual ones, the class certification inquiry focuses on the nature and/or method of proof likely to be offered by the plaintiff at trial. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. at 250. It is the mode of proof, not the merits of the plaintiff's case, which is relevant to the class certification question. *Eisen v. Carlislie & Jacquelin*, 417 U.S. 156, 177 (1974).

22. The party seeking class certification is obliged only to allege, or at most demonstrate, the availability of the kind of proof sought to be credited with class certification applicability. This requirement can be satisfied by the provision of the affidavits, the complaint, or even mere contentions as to the type of proof to be offered. *Bogosian*, 561 F.2d at 453; *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. at 251-52 (S.D. Texas 1978); *Shelter Realty Corp. v. Allied Maintenance Corp.*, 574 F.2d 656, 661, n. 15 (2nd Cir. 1978).

23. The Court finds that each of the class members share the same allegation that Amoco engaged in a common course of conduct and scheme which similarly affects each of them and thus gives rise to their cause of action. The fact that questions peculiar to each class member may remain after common questions have been resolved does not dictate the conclusion that a class action is impermissible. *Esplin*, at 100. Indeed, the term "predominance" indicates that individual issues will likely remain after common issues are decided. If later discovery and refinement of the issues somehow reveals that seemingly

identical treatment of the class members merits differing factors, appropriate subclasses may be created. *Janicik*, at 457.

24. *Superiority*. The Court finds that a class action is superior to any other available method for a fair and efficient adjudication of this controversy because individual joinder of all members of the class is impracticable and individual lawsuits by more than 2700 working interest owners would be inefficient and impracticable.

25. The evidence presented at the certification hearing was that the average claim of an individual working interest owner is relatively small. Given the discovery and litigation costs of such a case, the damages suffered by each member of the class may be proportionately small compared to the expense of litigating the claims. Thus, the expense and burden of individual litigation will make it difficult or impossible for a vast majority of individual members of the class to prosecute their claims.

26. The costs and burdens on the court system would be substantially increased if such litigation were to proceed on individual cases.

27. The conduct of this action as a class action presents fewer management difficulties, conserves the resources of the parties and the court system, and protects the rights of each class member.

28. Although the Court recognizes that there will necessarily be some moderate difficulties in managing a case of this magnitude, it is confident that the Court, the parties and the attorneys can effectively handle any such difficulties that may arise. As noted by the court in *In re Home-Stake Production Co. Securities Litigation*, 76 F.R.D. 351, 375 (N.D. Okla. 1977), "[m]anageability problems are significant only if they create a situation that is less fair and efficient than other available tech-

niques." "[T]he alternatives are either no recourse for thousands . . . to whom the courthouse would be out of bounds, or a multiplicity in scattering the suits with the inefficient administration of litigation which follows in its wake." *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2nd Cir. 1968), *cert. denied*, 429 U.S. 816 (1976).

29. The Court concludes, therefore, that the class action procedure is superior to any other means of handling the claims in issue.

30. Amoco argues in its briefs that the nationwide class requested by the plaintiff would violate fundamental principles of due process, and exceed the jurisdictional bounds of the Court, by including non-resident plaintiffs who cannot be served with actual notice. The Court does not agree. In *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) the United States Supreme Court held:

> Nothing in Rule 23, however, limits the geographical scope of a class action that is brought in conformity with that Rule.

31. Under the United States Supreme Court's holding in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), Oklahoma is not precluded from applying its own law in a class action so long as it has a "significant contact or aggregation of contacts" to the claims asserted by each member of the plaintiff class such that application of the forum law is not arbitrary or unfair. *Id.* at 818-19.

32. Amoco's contacts with the State of Oklahoma are significant and numerous. Amoco's billing practices and accounting systems and procedures for oil and gas properties in the United States are centralized in Tulsa, Oklahoma. Owners in Amoco operated properties nationwide receive joint interest bills which are generated from Amoco's Tulsa, Oklahoma, offices. Amoco's uniform and systematic allocation of charges is centralized and com-

puterized in Tulsa, Oklahoma. Complaints regarding joint interest billings from Amoco operated properties nationwide were directed to Amoco's Tulsa, Oklahoma, offices. Audits of Amoco operated properties nationwide were directed to and performed at Amoco's Tulsa, Oklahoma, offices. Amoco has maintained corporate offices in Tulsa, Oklahoma, for over 30 years. Amoco has availed itself of the benefits of the Oklahoma judicial system and has accepted the application of Oklahoma law to its business and actions.

33. It is not unreasonable for Amoco to expect the application of Oklahoma law to its business actions. Any class member who does not want its claims determined under Oklahoma law or determined as part of the class can easily opt out of the class after receipt of notice. In *In re Louisiana-Pacific Corp. Derivative Litigation*, 1997 WL 240975, to be reported at 705 A.2d 238 (Del. Ch. 1997), the court noted:

> Nationwide class actions in state courts are another example of instances in which the interests of an absent party may be constitutionally affected by a state court judgement. What makes binding absent parties in class actions constitutionally acceptable is either that: (1) under the provisions of Chancery Court Rule 23(b)(3), absent class members, in effect, elect not to opt-out of the class and thus can be said to effectively to consent to the foreign court exercising jurisdiction over their property (See *Phillips Petroleum Co. v. Shuns* [*sic*], 472 U.S. 797, 811, 105 S.Ct., 2965, 86 L. Ed.2d 628 (1985)) (holding that an absent member of a Subsection 23(b)(3) class can be bound by the results of litigation about which that member was notified and given an opportunity to be heard), . . . for the law to hold otherwise, would I suppose, be to make a

> talisman of physical presence in an age of global business and digitized information. Thus, in all events, there are circumstances where a state may constitutionally affect the interests of absent individuals.

Id. at 1.

34. In *American Express Travel Related Services Co., Inc. v. Walton*, 883 S.W.2d 703 (Ct. of App. Tx. 1994) the court upheld the certification of a nationwide class. In *American Express* the plaintiff credit card holder sought to certify a class of past and present credit card holders in an action complaining of the credit card company's practice of renting or selling card holders' names to third parties. The court of appeals upheld a class of thirty-nine million past and present American Express card holders. The court said:

> A forum state may exercise jurisdiction over the claim of an absent class-action plaintiff, though that plaintiff may not have minimum contacts with the forum necessary for personal jurisdiction over a defendant. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811, 105 S.Ct. 2965, 2974, 86 L.Ed.2d 628 (1985). If a forum state wants to bind an absent plaintiff to a judgment for money damages of similar relief at law, it must provide minimal procedural due process protections. The absent plaintiff must receive notice plus an opportunity to be heard and participate in the litigation. The forum state must provide the absent plaintiff with an opportunity to remove himself from the class. *Shutts*, at [sic] U.S. at 811-12, 105 S.Ct. at 2974-75.

Id. at 710.

35. A nationwide class action was also certified in *Purcell and Wardrope Chartered v. The Hertz Corp.*,

530 N.E.2d 994 (Ill. App. 1988). In *Hertz* the plaintiff brought a class action on behalf of a nationwide class to recover security deposits and accrued interest on security deposits that Hertz required pursuant to the terms of its automobile lease contracts. Hertz's vice president of its car leasing division claimed in an affidavit that Hertz entered into many different types of leasing agreements, "each uniquely tailored to the individual lessee's needs." *Id.* at 1073. The court found that, contrary to Hertz's vice president's assertions, the lease between the plaintiff and Hertz was a pre-printed, form type lease. Hertz, also argued that certification was improper because the trial court has applied Illinois law to the plaintiff's claim. The Illinois court applied the "most significant contacts" rule upheld in *Shutts*, and found Illinois had significant contacts to the plaintiff, and thus it was not a violation of constitutional law to apply the law of Illinois. The court noted that at a later point in the litigation, and after evidence was presented regarding the claims of the other class members, the choice of law issues could be re-examined and possible groups or divisions could be made. *Id.* at 1079.

36. The Court finds that the nationwide class sought to be certified in this case does not violate fundamental principles of due process or exceed the jurisdictional bounds of the Court as asserted by Amoco. The class sought to be certified in this case allows thousands of non-operating working interest owners the opportunity to join together in one case and seek redress.

37. Although Amoco argues that inevitable conflicts of law will make a class action unmanageable, Amoco has failed to show an actual conflict of law that has a material effect on this action. It is the defendants' burden to demonstrate the existence of a true conflict of law. *Lewis v. The Sac and Fox Tribe of Oklahoma Housing*

Authority, 896 P.2d 503 (Okla. 1994), *cert. denied*, 116 S.Ct. 476, 512 (1995) ("One who asserts that the law different from that of Oklahoma governs the dispute bears the burden of identifying and invoking that other law.") Moreover, at the certification stage it is improper to decide which law applies. *Weatherly v. Deloitte & Touche*, 905 S.W. 2d 642 (Tx. App. 1995) and *In re Lilco Securities Litigation*, 111 F.R.D. 663 (E.D. N.Y. 1986).

38. The Court finds that this case satisfies the requirements of the 12 Okla. Stat. § 2023.

IT IS ORDERED, ADJUDGED AND DECREED that Lobo's motion to certify a Class is GRANTED. This action shall henceforth be prosecuted as a certified class action with Lobo Exploration Company as class representative and with the following attorneys as class counsel: Allan DeVore and Jane G. Rowe of The DeVore Law Firm, a Professional Corporation; Douglas E. Burns of Douglas E. Burns, P.C.; and Robert J. Kee of Tippet and Kee, Attorneys at Law. Based on the record before the Court, the Class is defined as follows:

> All persons or entities who own or owned an interest in any drilling and spacing unit, secondary recovery unit, or other enhanced recovery unit or property, or in oil and gas wells wherein Amoco was or is the operator, and where Amoco (a) used allocation accounts, sometimes referred to as "functional location accountability codes" ("FLACS") and/or "Operating Centers" to bill and collect indirect charges and/or (b) billed and collected charges for the services of supervisors above first line supervision.
>
> Specifically excluded from the class are: (a) any and all Amoco offshore operated properties; (b) any forced pooled working interest, unless the force

pooled working interest owner entered into a joint operating agreement that superseded the pooling order; (c) all claims for improper billing of charges prior to January 1, 1983; (d) all agencies, departments or instrumentalities of the United States of America; and (e) Conoco Inc. and other persons or entities whom Plaintiff's counsel is prohibited from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct.

IT IS SO ORDERED this 11th day of July 1998.

/s/ George H. Lavender
Judge of the District Court

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Wednesday, November 10, 1999

91,757

LOBO EXPLORATION COMPANY

v.

AMOCO PRODUCTION COMPANY

Certiorari denied.

All Justices concur.

/s/ Hardy Summers
Chief Justice

APPENDIX D

RELEVANT STATE STATUTES

OKLAHOMA STATUTES ANNOTATED
TITLE 12, CIVIL PROCEDURE
CHAPTER 15. APPEAL AND ERROR

§ 12-993.

A. When an order:

1. Discharges, vacates, or modifies or refuses to discharge, vacate, or modify an attachment;

2. Denies a temporary or permanent injunction, grants a temporary or permanent injunction except where granted at an ex parte hearing, or discharges, vacates, or modifies or refuses to discharge, vacate, or modify a temporary or permanent injunction;

3. Discharges, vacates, or modifies or refuses to discharge, vacate, or modify a provisional remedy which affects the substantial rights of a party;

4. Appoints a receiver except where the receiver was appointed at an ex parte hearing, refuses to appoint a receiver, or vacates or refuses to vacate the appointment of a receiver;

5. Directs the payment of money pendente lite except where granted at an ex parte hearing, refuses to direct the payment of money pendente lite, or vacates or refuses to vacate an order directing the payment of money pendente lite;

6. Certifies or refuses to certify an action to be maintained as a class action; or

7. Grants a new trial or opens or vacates a judgment or order, the party aggrieved thereby may appeal the

order to the Supreme Court without awaiting the final determination in said cause, by filing the petition in error and the record on appeal with the Supreme Court within thirty (30) days after the order prepared in conformance with Section 696.3 of this title, is filed with the court clerk. If the appellant did not prepare the order, and Section 696.2 of this title required a copy of the order to be mailed to the appellant, and the court records do not reflect the mailing of a copy of the order to the appellant within three (3) days, exclusive of weekends and holidays, after the filing of the order, the petition in error may be filed within thirty (30) days after the earliest date on which the court records show that a copy of the order was mailed to the appellant. The Supreme Court may extend the time for filing the record upon good cause shown.

B. If the order discharges or modifies an attachment or temporary injunction and it becomes operative, the undertaking given upon the allowance of an attachment or temporary injunction shall stay the enforcement of said order and remain in full force until final order of discharge shall take effect.

C. Where a receiver shall be or has been appointed, upon the appellant filing an appeal bond, with sufficient sureties, in such sum as may have been required of the receiver by the court or a judge thereof, conditioned for the due prosecution of the appeal and the payment of all costs or damages that may accrue to the state or any officer or person by reason thereof, the authority of the receiver shall be suspended until the final determination of the appeal, and if the receiver has taken possession of any property, real or personal, it shall be returned and surrendered to the appellant upon the filing and approval of the bonds.

OKLAHOMA STATUTES ANNOTATED
TITLE 12, CIVIL PROCEDURE
CHAPTER 39. OKLAHOMA PLEADING CODE

§ 2023. Class actions

CLASS ACTIONS

A. PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

1. The class is so numerous that joinder of all members is impracticable;

2. There are questions of law or fact common to the class;

3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

4. The representative parties will fairly and adequately protect the interests of the class.

B. CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subsection A of this section are satisfied and in addition:

1. The prosecution of separate actions by or against individual members of the class would create a risk of:

a. inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

b. adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

2. The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

3. The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

a. the interest of members of the class in individually controlling the prosecution or defense of separate actions,

b. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,

c. the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and

d. the difficulties likely to be encountered in the management of a class action.

C. DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

1. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and may be altered or amended before the decision on the merits.

2. In any class action maintained under paragraph 3 of subsection B of this section, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all mem-

bers who can be identified through reasonable effort. The notice shall advise each member that:

a. the court will exclude him from the class if he so requests by a specified date,

b. the judgment, whether favorable or not, will include all members who do not request exclusion, and

c. any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

Where the class contains more than five hundred (500) members who can be identified through reasonable effort, it shall not be necessary to direct individual notice to more than five hundred (500) members, but the members to whom individual notice is not directed shall be given notice in such manner as the court shall direct, which may include publishing notice in newspapers, magazines, trade journals or other publications, posting it in appropriate places, and taking other steps that are reasonably calculated to bring the notice to the attention of such members, provided that the cost of giving such notice shall be reasonable in view of the amounts that may be recovered by the class members who are being notified. Members to whom individual notice was not directed may request exclusion from the class at any time before the issue of liability is determined, and commencing an individual action before the issue of liability is determined shall be the equivalent of requesting exclusion from the class.

3. The judgment in an action maintained as a class action under paragraphs 1 or 2 of subsection B of this section, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under paragraph 3 of subsection B of

this section, whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in paragraph 2 of subsection C of this section was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

4. When appropriate:

a. an action may be brought or maintained as a class action with respect to particular issues, or

b. a class may be divided into subclasses and each subclass treated as a class.

The provisions of this section shall then be construed and applied accordingly.

D. ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this section applies, the court may make appropriate orders:

1. Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

2. Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

3. Imposing conditions on the representative parties or on intervenors;

4. Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; and

5. Dealing with similar procedural matters.

The orders may be combined with an order under Section 16 of this act [1] and may be altered or amended as may be desirable from time to time.

E. DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

---

1 Section 2016 of this title.

Supreme Court, U.S.
FILED
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CLERK

(2)

No. 99-1502

In The

Supreme Court of the United States

AMOCO PRODUCTION COMPANY,

Petitioner,

v.

LOBO EXPLORATION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Civil Appeals Of The State Of Oklahoma

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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32 pp

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause are violated when a court enters an interlocutory order certifying a nationwide class and finds that, while Oklahoma has a significant contact or aggregation of contacts with the class members and the claims asserted by the class such that application of Oklahoma law would not be arbitrary or unfair, it will reserve the final choice of law determination upon reaching the merits?

PARTIES TO THE PROCEEDING

Petitioner is Amoco Production Company. Respondent is Lobo Exploration Co., individually and as the representative of the plaintiff class set forth below:

> All persons or entities who own or owned an interest in any drilling and spacing unit, secondary recovery unit, or other enhanced recovery unit or property, or in oil and gas wells wherein Amoco was or is the operator, and where Amoco (a) used allocation accounts, sometimes referred to as "functional location accountability codes" ("FLACS") and/or "Operating Centers" to bill and collect indirect charges and/or (b) billed and collected charges for the services of supervisors above first line supervision.
>
> Specifically excluded from the class are: (a) any and all Amoco offshore operated properties; (b) any forced pooled working interest, unless the force pooled working interest owner entered into a joint operating agreement that superseded the pooling order; (c) all claims for improper billing of charges prior to January 1, 1983; (d) all agencies, departments or instrumentalities of the United States of America; and (e) Conoco Inc., and other persons or entities whom Plaintiff's counsel is prohibited from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct.

Lobo Exploration Co. v. Amoco Production Co., 991 P.2d 1048, 1049-1050 (Okla. Ct. App. 1999), *cert. denied*, No. 91,757 (Okla. Nov. 10, 1999).

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Lobo Exploration Company declares that it has no parent or subsidiary companies or affiliates.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES AND AFFILIATES ii

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES v

JURISDICTION 1

STATEMENT OF THE CASE 5

REASONS FOR DENYING PETITION FOR *CERTIORARI* 12

I. DUE PROCESS AND FULL FAITH AND CREDIT DO NOT PROHIBIT OKLAHOMA FROM APPLYING ITS OWN LAW TO A NATIONWIDE CLASS ACTION 12

II. THE CHOICE OF LAW ISSUE IS ONLY ONE FACTOR TO CONSIDER IN DETERMINING THE PREDOMINANCE AND SUPERIORITY REQUIREMENTS OF A CLASS ACTION 16

III. CLASS CERTIFICATION DOES NOT REQUIRE PLAINTIFF TO PROVE ALL POSSIBLE LAWS THAT COULD APPLY 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

In re Activision Securities Litigation, 621 F.Supp. 415 (N.D. Cal. 1985) 6

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) ... 12, 14, 19

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 19

Anderson v. City of Albuquerque, 690 F.2d 796 (10th Cir. 1982) 7, 20

Angeles/Quinoco Securities Corp. v. Collision, 841 S.W.2d 511 (Tx. App. 1992) 6

Banholzer v. New York Life Ins. Co., 178 U.S. 402 (1900) 19

Barnebey v. E.F. Hutton & Co., 715 F.Supp. 1512 (M.D. Fla. 1989) 13

Black Hawk Oil Co. v. Exxon Corp., 969 P.2d 337 (Okla. 1998) 10

Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976) 20

Brown v. Market Dev., Inc., 332 N.E.2d 367 (Ohio 1974) 14

Califano v. Yamasaki, 442 U.S. 682 (1979) 21

Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469 (1947) 12

Clay v. Sun Insurance Office Ltd., 377 U.S. 179 (1964) 14

Collins v. Miller, 252 U.S. 364 (1920) 3

In re Computer Memories Securities Litigation, 111 F.R.D. 675 (N.D. Cal. 1986) 6, 13, 16, 20

TABLE OF AUTHORITIES – Continued

Page

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) ...4, 5

State ex rel. Corbin v. Pickrell, 667 P.2d 1304 (Az. 1983).....11, 13

Cox Broadcasting Corp. v. Cohen, 420 U.S. 469 (1975) 3

Dept. of Banking, State of Nebraska v. Pink, 317 U.S. 264 (1942)..... 2

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974)..... 6, 10, 19, 20

Flynt v. Ohio, 451 U.S. 619 (1981) 2

Gillette Co. v. Miner, 459 U.S. 86 (1982)..... 2

Gordon v. Boden, 586 N.E.2d 461 (Ct. App. Ill. 1991), *cert. denied*, 506 U.S. 907 (1992)..... 6, 16, 17

Herbst v. International Tel. & Tel. Corp., 495 F.2d 1308 (2nd Cir. 1974)..... 5

Jefferson v. City of Tarrant, Alabama, 522 U.S. 75 (1997)..... 2

In re Kirschner Medical Corp. Securities Litigation, 139 F.R.D. 74 (D. Md. 1991) 13

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923)..... 21

Louisville & Nashville R. Co. v. Melton, 218 U.S. 36 (1910)..... 18

Lobo Exploration Company v. Amoco Production Company, 991 P.2d 1048 (Okla. Ct. App. 1999), *cert. denied*, No. 91,757 (Okla. Nov. 10, 1999)..... 1

TABLE OF AUTHORITIES – Continued

Page

Market St. Ry. Co. v. Railroad Comm'n., 324 U.S. 548 (1945) 3

Martin v. Heinold Commodities, Inc., 510 N.E.2d 840 (Ill. 1987) 11

Microsoft v. Manning, 914 S.W.2d 602 (Tx. Ct. App. 1995) 6

Nevada v. Hall, 440 U.S. 410 (1979) 12

Parkinson v. April Industries, Inc., 520 F.2d 650 (2nd Cir. 1975) 5

Pennsylvania v. San Juan Hospital, Inc., 528 F.2d 1181 (10th Cir. 1975) 7

Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917) 18

Perry v. Meek, 618 P.2d 934 (Okla. 1980) 6

Peterson v. Dougherty Dawkins, Inc., 583 N.W.2d 626 (N.D. 1988) 6, 17, 18

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 5, 12, 17, 19

Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 2

Richfield Oil Corp. v. State Bd. Of Equalization, 329 U.S. 69 (1946) 2

Rio Grande Oil Co. v. State, 539 S.W.2d 917 (Tex. Civ. App. 1976) 14

Roberts v. Heim, 670 F.Supp. 1466 (N.D. Cal. 1987), *cert. denied*, 493 U.S. 1002 (1989) 16

TABLE OF AUTHORITIES – Continued

Page

Shores v. First City Bank Corp., 689 P.2d 299 (Okla. 1984) 6

South Carolina Nat'l Bank v. Stone, 139 F.R.D. 325 (D.S.C. 1991) 14

Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) ... 6, 18, 19

In re Synergen, Inc. Securities Litigation, 154 F.R.D. 265 (D. Colo. 1994) 20

Texas & N.O. R. Co. v. Miller, 221 U.S. 408 (1911) ..6, 18

Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996) 20

Watson v. Employers Liability Corp., 348 U.S. 66 (1954) 14

Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953) 19

Western Life Indemnity Co. v. Rupp, 235 U.S. 261 (1914) 18

Zinberg v. Washington Bancorp, Inc., 138 F.R.D. 397 (D.C. N.J. 1990) 14

STATUTES

28 U.S.C. §1257(a) 1, 2

12 Okla. Stat. §993A.6 2

12 Okla. Stat. §2023.....6, 16

OTHER AUTHORITIES

7B C. Wright, A. Miller, M. Kane, *Federal Practice and Procedure*, §1802 (2nd ed. 1986) 5

TABLE OF AUTHORITIES – Continued

Page

16B C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* §4001 (2nd ed. 1996) 21

16B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4010 (2nd ed. 1996) 4

RESPONSE TO PETITION FOR A WRIT OF *CERTIORARI*

Respondent, Lobo Exploration Company ("Lobo"), respectfully submits its response and objection to Amoco Production Company's ("Amoco") petition for writ of *certiorari*.

JURISDICTION

This Court does not have jurisdiction. Amoco seeks *certiorari* review of a decision of the Oklahoma Court of Civil Appeals in *Lobo Exploration Company v. Amoco Production Company* affirming the interlocutory decision of the District Court of Beaver County, State of Oklahoma ("the trial court") granting class certification.[1] Pursuant to 28 U.S.C. §1257(a) this Court's review of state court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." It is apparent from the Oklahoma Court of Civil Appeal's decision and the trial court's order that there has not been a final judgment or decree.[2]

There can be no dispute about the interlocutory nature of the decision sought to be reviewed. Indeed, the case only reached the Oklahoma Supreme Court, wherein *certiorari* was denied, because Oklahoma law authorizes

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[1] *Lobo Exploration Company v. Amoco Production Company*, is reported at 991 P.2d 1048 (Okla. Ct. App. 1999) (Pet. App. 1a-15a), *cert. denied*, No. 91,757 (Okla. Nov. 10, 1999) (Pet. App. 57a).

[2] Pet. App. 7a, 17a.

limited review of certain interlocutory orders.[3] The fact that Oklahoma law provides for an interlocutory appeal and that a decision was had by the Oklahoma Court of Appeals has no effect on whether its ruling is final for purposes of 28 U.S.C. §1257(a).[4]

In *Gillette Co. v. Miner*, 459 U.S. 86 (1982) the Court addressed the issue of *certiorari* review of an interlocutory order, like the one in this case, which allowed a case to proceed forward as a class action. In *Miner* the Supreme Court of Illinois ruled that an Illinois state court could maintain an action on behalf of a nationwide plaintiff class of consumers. The defendant petitioned the United States Supreme Court for *certiorari*. The Court initially granted *certiorari*, but then dismissed the writ, succinctly stating, "There being no final judgment, the writ of *certiorari* is dismissed for want of jurisdiction."[5]

The finality requirement "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system."[6] Before a state court decision can be final and reviewable it "must

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[3] 12 Okla. Stat. §993A.6; Pet. App. 58a.

[4] *Dept. of Banking, State of Nebraska v. Pink*, 317 U.S. 264, 268 (1942); *Richfield Oil Corp. v. State Bd. Of Equalization*, 329 U.S. 69, 72 (1946).

[5] *Gillette v. Miner*, 459 U.S. at 87. See also, *Flynt v. Ohio*, 451 U.S. 619 (1981) (dismissing writ of *certiorari* for want of jurisdiction due to lack of finality despite decision of state supreme court to review intermediate court decision remanding case for trial); *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997) (dismissing writ of *certiorari* because the Alabama Supreme Court had not yet rendered a final judgment).

[6] *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945).

. . . be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein."[7] The Court has expressly held that the judgment "should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved."[8] The decision of the Oklahoma Court of Appeals plainly does not meet this standard.

In support of its claim that this Court has jurisdiction, Amoco has cited *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469 (1975). In *Cox* the Court set forth four categories of cases in which the Court treated state-court judgments as final even though further proceedings were to take place in the state court.[9] In each category in *Cox* the

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[7] *Market St. Ry. Co. v. Railroad Comm'n.*, 324 U.S. 548, 551 (1945).

[8] *Collins v. Miller*, 252 U.S. 364, 370 (1920).

[9] *Cox Broadcasting Corp. v. Cohen*, holds that the finality requirement may be satisfied despite the pendency of further proceedings when: (1) "there are further proceedings . . . yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained," (2) "the federal issue . . . will survive and require decision regardless of the outcome of future state-court proceedings," (3) "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case," or (4) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds . . . and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action. . . . " 420 U.S. at 479-483.

highest state court had finally decided the federal question and in at least most of the categories there was no risk that other federal questions would require a second review.[10] In the present case, the Oklahoma courts recognized the interlocutory, non-final nature of the class certification order in holding that the court had the authority to modify the class, create appropriate subclasses, or even decertify the class if warranted at a later date.[11] Under Amoco's theory, if the trial court modified the certification order prior to a final determination on the merits, Amoco could repeatedly seek *certiorari* to this Court following each such modification. Such piece meal appellate review would effectively end the finality requirement, would flood the Court with ill-founded certification applications, and would result in a tremendous waste of judicial resources.[12] Amoco has failed to demonstrate why review of a final judgment would not sufficiently protect its due process and full faith and credit interests.

Amoco argues that the Court has jurisdiction for *certiorari* review in any case where a defendant is forced to expend substantial time and money defending a class action, an argument commonly referred to as the "Death Knell Doctrine." That argument has been categorically rejected by this Court:[13]

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[10] 16B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4010 p. 171 (2nd ed. 1996).

[11] Pet. App. 7a, 17a, 49a-50a.

[12] 16B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4010 p. 202 (2nd ed. 1996).

[13] *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 (1978).

> [T]he fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a final decision within the meaning of §1291.[14]

Respondents respectfully request the Court to dismiss Amoco's petition for *certiorari* for want of jurisdiction.

STATEMENT OF THE CASE

The statement of the case presented by Amoco presents in a false light much of the evidence upon which the Oklahoma Court of Civil Appeals found that the trial court did not abuse its discretion in certifying a nationwide class action.

Amoco incorrectly asserts that the Oklahoma courts below failed to require a choice of law analysis before certifying a class action, and that such purported failure was violative of this Court's pronouncement in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The Oklahoma courts understood and correctly applied *Shutts* when they considered how the choice of law issues would affect the

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[14] *Coopers & Lybrand v. Livesay*, 437 U.S. at 477. See also, 7B C. Wright, A. Miller, M. Kane, *Federal Practice and Procedure*, §1802 (2nd ed. 1986) (The inverse death knell doctrine propounded in *Herbst v. International Tel. & Tel. Corp.*, 495 F.2d 1308 (2nd Cir. 1974) and *Parkinson v. April Industries, Inc.*, 520 F.2d 650 (2nd Cir. 1975), cases relied upon by Amoco, was rejected by implication in *Coopers & Lybrand v. Livesay*).

predominance and superiority requirements of certification pursuant to 12 Okla. Stat. §2023.[15] *Shutts* has limited application at the present stage of these proceedings because much of the discussion in *Shutts* involved the propriety of merit based determinations where substantive state law was actually applied to the underlying claims of the class members. The appeal in *Shutts* was not from an interlocutory order certifying the class (which is the situation in the present case), but instead was an appeal after the trial on the merits.[16] In determining whether a class action will be certified, the merits are not to be examined and all uncontroverted allegations in the instruments of record and the undenied statements of counsel in their briefs are to be taken as true.[17] In *In re Synergen, Inc. Securities Litigation*, 154 F.R.D. 265, 267 (D. Colo. 1994), the court held: "In ruling on a motion for class certification pursuant to Rule 23 . . . [the court] may not consider the merits of the proposed class action

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[15] *Microsoft v. Manning*, 914 S.W.2d 602 (Tx. Ct. App. 1995); *Roberts v. Heim*, 670 F.Supp. 1466 (N.D. Cal. 1987), *cert. denied*, 493 U.S. 1002 (1989); *Peterson v. Dougherty Dawkins, Inc.*, 583 N.W.2d 626 (N.D. 1988); *Gordon v. Boden*, 586 N.E.2d 461 (Ct. App. Ill. 1991), *cert. denied*, 506 U.S. 907 (1992); *In re Activision Securities Litigation*, 621 F.Supp. 415, 430-431 (N.D. Cal. 1985); *Angeles/Quinoco Securities Corp. v. Collision*, 841 S.W.2d 511, 516-517 (Tx. App. 1992); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996); *In re Computer Memories Securities Litigation*, 111 F.R.D. 675, 685 (N.D. Cal. 1986).

[16] *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 799.

[17] *Shores v. First City Bank Corp.*, 689 P.2d 299, 301 (Okla. 1984); *Perry v. Meek*, 618 P.2d 934, 941 (Okla. 1980); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974).

claim."[18] With respect to the choice of law issue in the present case, the trial court did not finally determine what law would govern the trial on the merits, but found under *Shutts* that:

> Oklahoma has significant contacts and aggregation of contacts to the claims asserted by each class member to create sufficient state interests to ensure that the application of Oklahoma law is not arbitrary, unfair, or in violation of due process.[19]

The court found that at the certification hearing it would be improper to decide definitively which law applies because to do so would require a merit based determination.[20]

Amoco states as a "fact" that its billing practices are governed by 7,000 joint operating agreements and that the manner in which the joint operating expenses were billed varied substantially. Even if Amoco's contention is accurate as to the number of joint operating agreements (PX 2L questions the accuracy of this assertion), the Oklahoma courts found that the provisions of the agreements which are at issue in this case are uniform across the board with only minor exceptions.[21] The only evidence presented at the certification hearing demonstrated overwhelmingly that the charges disputed by the class were

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[18] Citing, *Pennsylvania v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1189 (10th Cir. 1975). See also, *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982).

[19] Pet. App. 6a, 46a.

[20] Pet. App. 6a-7a, 54a-55a.

[21] Pet. App. 8a, 9a, 21a-22a, 24a-25a, and 29a.

uniformly billed by Amoco to the class members regardless of which agreement was in place.[22] This evidence was utilized in forming a portion of the trial court's findings:

> The Court finds that Amoco itself treats the class members as a class each and every month when it uniformly and systematically bills the class members for the same types of allocated charges through FLACs from its Tulsa, Oklahoma offices . . . Amoco admitted Lobo's commonality and typicality with working interest owners throughout the nation, stating "We [Amoco] have approximately 60 audits performed on Amoco operated properties each year, all of which receive charges in the same manner and using the same systems as those used to generate charges to this [Lobo's] unit. (Plaintiff's Exhibit 6H, 6I and 2CC.)"[23]

The witnesses at the certification hearing, including those employed by Amoco, testified that the agreements were of standard form and that the relevant provisions and their interpretation did not change significantly over time.[24]

Amoco's reference in its "Statement of Facts" to 250 audits since 1990 is misleading for all of the following reasons. Most of the audits were multiple audits by the same small group of approximately 30 companies. Many of the audits were by the same companies on the same wells for multiple time periods. Almost half of the audits

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[22] *Id.*

[23] Pet. App. 21a-22a.

[24] Pet. App. 22a-29a.

did not deal with any of the billing issues raised by the class, and none of the audits fully explored the depth or breadth of Amoco's fraudulent double billing scheme. There was no evidence that the information obtained in the audits was routinely shared by the auditing company with other working interest owners in the well. Although Amoco states that most of the audits have been resolved, the evidence was that many of the audits which included issues raised by the class have not been resolved, and the instances where those issues were resolved resulted in credits to Amoco's joint owners in the amount of approximately ten million dollars. These payments only help confirm that Amoco was well aware of its wrongful double billing. Some of the audits were "resolved" because the amounts were too small to economically pursue. Even so, 250 audits on 26,000 wells is an exceedingly small number.

Amoco contends that it made full and express disclosure to companies which audited its records on issues raised by the class. The evidence at the certification hearing was that Amoco responded to audit inquiries with uniform, standardized responses given without regard to the purported variations which Amoco now alleges exist among its agreements with the class members.[25] This consistent treatment by Amoco further reinforces the wisdom of class certification by the trial court.

Amoco contends in its "Statement of Facts" that the large, sophisticated working interest owners who pay a large portion of the **total** joint interest billings (but not

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[25] Pet. App. 21a-25a.

necessarily the disputed charges) knew of the "hidden" charges. Amoco acknowledged that its billing practices were "pushing the envelope" and identified a handful of class members as having certain types of billing practices which Amoco asserted, without substantive evidentiary support, were similar to those that are the subject of the class claims against Amoco. The references to the practices of the other companies were primarily anecdotal, and no billing documents were shown to demonstrate that the alleged similarities actually existed. Amoco's argument relates to the merits of the action, and inquiry into the merits is prohibited when the court is deciding whether a class should be certified.[26] Even if one were to blindly accept the truth of Amoco's assertion, it would mean that approximately 1% of working interest owners (the "large, sophisticated working interest owners") may have known something about Amoco's fraudulent billing scheme. That assumption would only reinforce the fact that the majority of the class knew nothing of Amoco's scheme.

One of the most glaring misstatements in Amoco's recitation of the facts is its contention that the Oklahoma courts failed to conduct any analysis of the contacts of the absent class members that would justify application of Oklahoma law to their claims. The trial court specifically identified the contacts of the class members with Oklahoma that related to the actions of Amoco in this case:

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[26] *Eisen v. Carlisle*, 417 U.S. at 177-78. Pet. App. 12a-13a citing, *Black Hawk Oil Co. v. Exxon Corp.*, 969 P.2d 337 (Okla. 1998).

> Amoco's billing practices and accounting procedures for oil and gas properties in the United States are centralized in Tulsa, Oklahoma. Owners in Amoco operated properties nationwide receive joint interest bills which are generated from Amoco's Tulsa, Oklahoma, offices. Amoco's uniform and systematic allocation of charges is centralized and computerized in Tulsa, Oklahoma. Complaints regarding joint interest billings from Amoco operated properties nationwide were directed to Amoco's Tulsa, Oklahoma office. Audits of Amoco operated properties nationwide were directed to and performed at Amoco's Tulsa, Oklahoma, office.[27]

Likewise following its review, the Oklahoma Court of Civil Appeals also found that Oklahoma had significant contacts or aggregation of contacts to the claims asserted by each class member to create sufficient state interest to ensure that application of Oklahoma law was not arbitrary, unfair, or violative of due process.[28] As pointed out by the Oklahoma Court of Appeals, Lobo, on behalf of itself and the class, complains of Amoco's conduct in Oklahoma.[29] Oklahoma has an interest in redressing wrongs committed within Oklahoma.[30]

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[27] Pet. App. 51a-52a.

[28] Pet. App. 6a-7a.

[29] Pet. App. 12a.

[30] Pet. App. 12a, citing *Martin v. Heinold Commodities, Inc.*, 510 N.E.2d 840, 847 (Ill. 1987) and *State ex rel. Corbin v. Pickrell*, 667 P.2d 1304, 1312 (Az. 1983).

REASONS FOR DENYING PETITION FOR *CERTIORARI*

I. DUE PROCESS AND FULL FAITH AND CREDIT DO NOT PROHIBIT OKLAHOMA FROM APPLYING ITS OWN LAW TO A NATIONWIDE CLASS ACTION

Amoco's Due Process and Full Faith and Credit challenge is without merit. The trial court looked at the contacts between the State of Oklahoma and the class members, as well as the transactions and circumstances surrounding Amoco's alleged double billing scheme and found numerous significant contacts that would preliminarily appear to satisfy a constitutional basis for applying Oklahoma law to the entire class.[31] Such contacts include the fact that Amoco's billing practices and accounting system and procedures for oil and gas properties in the United States are centralized in Oklahoma.[32] Class members receive joint interest bills which are generated and mailed in Oklahoma.[33] Amoco's uniform and systematic allocation of charges is centralized and computerized in

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[31] Pet. App. 6a, 20a-21a, 51a-52a. In reviewing similar challenges this Court has examined whether the state whose law was applied had significant contact or aggregation of contacts, creating state interests, with the parties to the litigation or with the occurrences or transactions which gave rise to the litigation in order to ensure that the choice of law was neither arbitrary nor fundamentally unfair. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307-09 (1981) (plurality); *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988); *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 818; *Nevada v. Hall*, 440 U.S. 410, 424 (1979); *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947).

[32] Pet. App. 6a, 20a-21a, 51a-52a.

[33] Pet. App. 51a-52a.

Oklahoma.[34] Class members are directed to, and do, submit any questions and complaints regarding the class members joint interest bills for Amoco operated properties nationwide to Amoco's Oklahoma office.[35] Class members requests for audits are directed to Oklahoma, and audits of Amoco properties nationwide can only be performed in Oklahoma.[36] Oklahoma clearly has a significant state interest in redressing the wrongful conduct committed within its borders by an enterprise operated in Oklahoma even though some of the persons damaged may be located outside this state.[37] Contacts similar to or of even less significance have routinely been found to justify the application of one state's law to a controversy involving parties in multiple states.[38]

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[34] Pet. App. 52a.

[35] *Id.*

[36] *Id.*

[37] *Id. State ex rel. Corbin v. Pickrell*, 667 P.2d at 1312; *Brown v. Market Dev. Inc.*, 332 N.E.2d 367 (Ohio 1974).

[38] *See, State ex rel Corbin v. Pickrell*, 667 P.2d at 1312, (Arizona law could be applied to conduct by local business against out-of-state residents.) *In re Computer Memories Securities Litigation*, 111 F.R.D. at 686, (California law could be applied to entire class in nationwide securities fraud case where defendant was a California corporation, acts complained of emanated from California, and the money collected went to California.) *Barnebey v. E.F. Hutton & Co.*, 715 F.Supp. 1512, 1535-36 (M.D. Fla. 1989) (Oklahoma Blue Sky Laws applied to the sales of securities because of the number and extent of activities occurring in Oklahoma and because of Oklahoma's legitimate interest in having its law applied.) *In re Kirschner Medical Corp. Securities Litigation*, 139 F.R.D. 74, 83-84 (D. Md. 1991) ("[A]pplication of Maryland law to the common law claims is neither arbitrary nor unfair because contacts exist

Even if the law of another state could constitutionally be applied, it would not render the application of Oklahoma law unconstitutional. This Court has long recognized that a set of facts giving rise to a lawsuit may constitutionally justify the application of the law of more than one jurisdiction.[39]

As a result, the forum state may have to select one law from among the laws of several jurisdictions having some contact with the controversy.[40]

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between the forum and the claims asserted.") *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 411 (D.C. N.J. 1990) (New Jersey law could be applied to the claims of the class because "the interest of states other than New Jersey where the class members reside would be advanced by providing these plaintiffs with an opportunity to litigate their negligent misrepresentation claims in a single action.") *Brown v. Market Dev., Inc.*, 322 N.E.2d at 369. (Ohio UDAP statute is intended to prohibit, and to provide civil remedies to enforce the prohibitions of, deceptive and unconscionable acts and practices by Ohio suppliers in connection with consumer transactions, irrespective of the location of the consumer, whether within or without Ohio.) *South Carolina Nat'l Bank v. Stone*, 139 F.R.D. 325, 334 (D.S.C. 1991) (Applying South Carolina law to the claims of the class, including claims of common law fraud.) *Rio Grande Oil Co. v. State*, 539 S.W.2d 917, 921 (Tex. Civ. App. 1976) ("A state is damaged if its citizens are permitted to engage in fraudulent practices even though those injured are outside its borders.")

[39] *Allstate Ins. Co. v. Hague*, 449 U.S. at 307-308 (citing, *Watson v. Employers Liability Corp.*, 348 U.S. 66, 72-73 (1954) and *Clay v. Sun Insurance Office Ltd.*, 377 U.S. 179, 181-82 (1964).)

[40] *Allstate Ins. Co. v. Hague*, 449 U.S. at 308. See also, *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 822 ("[W]e reaffirm our observation in Allstate that in many situations a state court may be free to apply one of several choices of law."); and *Sun Oil Co. v. Wortman*, 486 U.S. at 730.

Amoco has argued inconsistent choice of law approaches at different junctures in this case. In its initial brief submitted to the trial court Amoco argued that a lawsuit involving numerous plaintiffs from multiple states bringing claims like those sought by the class was legally permissible, manageable and routine. As stated by Amoco: "Non-operators who have interests in a common group of units or wells, and who share the same operative facts, have for decades combined together to bring oil and gas lawsuits." Then, in its submissions to the Oklahoma appellate courts, Amoco propounded the inconsistent argument that the law of the state where a damaged class member resided must control the controversy. In its petition for *certiorari* to this Court, Amoco now inconsistently argues that application of the laws of 18 different states where the wells are located must control the controversy. Not only are Amoco's arguments at various stages of this lawsuit inconsistent with one another, they are also inconsistent with the many pronouncements of this Court and other lower courts.

Amoco has never attempted to demonstrate that the contract laws of each of these 18 states conflict or that application of the laws of even 18 states would make the case unmanageable.[41] The trial court specifically noted that appropriate subclasses could be created to manage the case if, upon further proceedings, it appeared some variation in treatment of members of the class was warranted.[42]

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[41] Pet. App. 54a.

[42] Pet. App. 49a-50.

II. THE CHOICE OF LAW ISSUE IS ONLY ONE FACTOR TO CONSIDER IN DETERMINING THE PREDOMINANCE AND SUPERIORITY REQUIREMENTS OF A CLASS ACTION

At the certification stage of the case, the trial court conducted a threshold inquiry to determine, *inter alia*, whether the choice of law issue would negatively impact the predominance requirement of 12 Okla. Stat. §2023 so as to outweigh other factors favoring class certification.[43]

In *Gordon v. Boden* the plaintiffs represented a nationwide class of consumers who bought adulterated orange juice products that were processed by defendant. The orange juice was labeled 100% orange juice when in fact it contained other low-cost, inferior ingredients. The trial court granted the plaintiffs' motion for class certification. The defendant appealed the certification and argued in part that the trial court would have to apply to each purchase the substantive law of the state in which each class member bought the adulterated orange juice. The defendant contended that the common question was, therefore, governed by the substantive laws of possibly 50 states and did not predominate. The appellate court did not agree.

> The question of whether the laws of different states apply to specific transactions alleged in a class action will not ordinarily prevent certification of the class. [Citations omitted.] We initially note that if the trial court found that Illinois has significant contact to the claims asserted by each

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[43] See, *Roberts v. Heim*, 670 F.Supp. at 1495 and *In Re Computer Memories Securities Litigation*, 111 F.R.D. at 685-686.

> class member, the court could apply Illinois substantive law to this multi-state class action. This finding would ensure that the application of Illinois law is neither arbitrary nor unfair. . . . Moreover, if at some later time in the litigation the subclassification becomes unmanageable, the court, of course, always has the option to set aside the class certification or a portion of it. [Citations omitted.] **At the most, this question constitutes a hypothetical problem that might arise in the future.** As such, it is not a sufficient basis to refuse to certify an otherwise properly pleaded class action. [Citations omitted.] [Emphasis added.][44]

Similarly, in *Peterson v. Dougherty Dawkins, Inc.* the defendant ineffectively argued the choice of law issue before it had been determined.

> Dougherty argues the trial court erroneously held that North Dakota law will govern all the bondholders claims. Dougherty asserts the decision of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2966, 86 L.Ed.2d 628 (1985), precludes application of North Dakota law to the nonresident bondholders.
>
> * * *
>
> Dougherty has misconstrued the trial court's order. **The court did not rule that North Dakota law would govern all claims, but specifically reserved ruling on that issue.** The court expressly noted that, if conflict of law questions become "problematic," the court might create

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[44] *Gordon v. Boden*, 586 N.E. at 465.

> subclasses or exclude particular members from the class.
>
> * * *
>
> When the trial court ultimately decides the choice of law issues, it must consider the holding in Phillips Petroleum that a state may apply its own law to members of a class only if the state has a significant contact or an aggregate of contacts to the claims asserted by each class member. [Citation omitted.] Phillips Petroleum does not, however, hold that a multi-state class action cannot be certified if the court will have to apply different states' law to some class members' claims. [Emphasis added.][45]

The Oklahoma courts' determination that Oklahoma law could constitutionally apply to the claims of the class, demonstrates that in the courts' opinion the predominance requirement was not destroyed by the choice of law issues.

III. CLASS CERTIFICATION DOES NOT REQUIRE PLAINTIFF TO PROVE ALL POSSIBLE LAWS THAT COULD APPLY

Amoco's argument that it is the plaintiff's burden to identify all of the possible laws that could apply to the class has been rejected by this Court.[46] Neither the Due

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[45] *Peterson v. Dougherty Dawkins, Inc.*, 583 N.W.2d at 626.

[46] *Sun Oil Co. v. Wortman*, 486 U.S. at 730-72; *Western Life Indemnity Co. v. Rupp*, 235 U.S. 261, 275 (1914); *Texas & N.O. R. Co. v. Miller*, 221 U.S. 408, 416 (1911); *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917); *Louisville*

Process Clause nor the Full Faith and Credit Clause mandates that a state must adopt any particular set of conflict rules, but merely sets certain minimum requirements which each state must observe when asked to apply its own laws or the laws of sister states.[47]

& Nashville R. Co. v. Melton, 218 U.S. 36, 51-52, (1910); *Banholzer v. New York Life Ins. Co.*, 178 U.S. 402, 408 (1900); See also, *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 834-842 (Stevens, J., concurring in part and dissenting in part).

Amoco's reliance on *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), is misplaced. In *Amchem* the Court was confronted with the legitimacy under Rule 23 of a global settlement of current and future asbestos-related claims. Such a determination at settlement is merit based. The class proposed for certification encompassed hundreds of thousands, perhaps millions, of individuals, each of whom were, or some day could be, adversely affected by past exposure to asbestos products manufactured by one or more of the twenty defendant companies. The Court expressly stated it had granted review to decide the role settlement might play in determining the propriety of class certification. The Court noted that "[n]o settlement class called to our attention is as sprawling as this one." *Id.* at 622. The case at hand, unlike *Amchem*, does not present the issue of the propriety of a merit based determination on certification of a class action for settlement of mass tort, personal injury claims that, by their very nature, involved individualized questions of damages, liability and defenses that affected each class member in peculiarly personal ways. In this case the Oklahoma courts certified a nationwide class that had been monetarily damaged by Amoco's uniform double billing scheme contrived in and carried out from the State of Oklahoma.

[47] *Eisen v. Carlisle & Jacquelin*, 417 U.S. at 177-178; *Wortman*, 486 U.S. at 735 (Blackmun, concurring in part and concurring in judgment) (quoting *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516 (1953).) *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 818, *Allstate Ins. Co. v. Hague*, 449 U.S. at 312, 313.

In *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996), the court said that requiring the plaintiff to prove all the differences in various states' laws was requiring a merit based determination of the plaintiffs' claims at the certification hearing in direct contravention of the holdings in *Eisen v. Carlisle & Jacquelin* and its progeny.[48]

In *In re Computer Memories Securities Litigation* the defendant argued that the plaintiff had the burden at the certification stage to show all of the possible jurisdictions whose law could apply. The court rejected the defendant's argument and said:

> Imposing such a burden on the putative class representatives seems overly onerous in light of the fact that, at the time of the class certification motion, it may be unclear whether any party will ever attempt to invoke the law of another jurisdiction. The court would in effect be requiring the putative class representative to defeat a myriad of motions for the application of foreign law that may never be filed.[49]

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[48] *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976); *In re Synergen, Inc. Securities Litigation*, 154 F.R.D. at 267, *Anderson v. City of Albuquerque*, 690 F.2d at 799.

[49] *In re Computer Memories Securities Litigation*, 111 F.R.D. at 685.

CONCLUSION

Certification of a nationwide class is supported by the evidence, the holdings of this Court and the Constitution of the United States. As succinctly stated in *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979):

> Nothing in Rule 23, however, limits the geographical scope of a class action that is brought in conformity with that Rule.

The interlocutory order certifying this case as a class action is firmly centered on a common, uniform, and systematic double-billing scheme created, implemented, and carried out within the State of Oklahoma by Amoco which has affected Amoco's non-operating working interest owners nationwide. The issues presented in Amoco's petition for writ of *certiorari* do not raise novel issues or issues of great public importance or national interest such that this Court should devote its limited time and resources to a review.[50]

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[50] *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); 16B C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* §4001 (2nd ed. 1996).

Respondent respectfully requests this Court to deny Amoco's petition for writ of *certiorari*.

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No. 99-1502

IN THE
Supreme Court of the United States

AMOCO PRODUCTION COMPANY,
Petitioner,
v.
LOBO EXPLORATION COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of Oklahoma

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14pp

TABLE OF AUTHORITIES

CASES — Page

Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967) 8
Amchem Prods., Inc. v. *Windsor*, 521 U.S. 591 (1997) 2
Blair v. *Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999) 8
Calder v. *Jones*, 465 U.S. 783 (1984) 7
Castano v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) 6
Carnival Cruise Lines, Inc. v. *Shute*, 499 U.S. 585 (1991) 5
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) ... 9
Cox Broad. Corp. v. *Cohen*, 420 U.S. 469 (1975) 7
Department of Banking v. *Pink*, 317 U.S. 264 (1942) ... 9
Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) 9
Gillette Co. v. *Miner*, 459 U.S. 86 (1982) 8
Market Street Ry. v. *Railroad Comm'n*, 324 U.S. 548 (1945) 9
Miner v. *Gillette Co.*, 428 N.E.2d 478 (Ill. 1981), *cert. dismissed*, 459 U.S. 86 (1982) 8
Parkinson v. *April Indus., Inc.*, 520 F.2d 650 (2d Cir. 1975) 8
Pennsylvania v. *Ritchie*, 480 U.S. 39 (1987) 7
Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) . 1, 4, 5
In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995) 8
Richfield Oil Corp. v. *State Bd. of Equalization*, 329 U.S. 69 (1946) 9
Rush v. *Savchuck*, 444 U.S. 320 (1980) 7
Shaffer v. *Heitner*, 433 U.S. 186 (1977) 7
Southland Corp. v. *Keating*, 465 U.S. 1 (1984) 7

TABLE OF AUTHORITIES—Continued

Page

Spinozzi v. *ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999) 5

Walsh v. *Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986) 6

RULES

Fed. R. Civ. P. 23(f) Advisory Comm. Notes 10

Sup. Ct. R. 10(c) 2

SCHOLARLY AUTHORITIES

Janet Cooper Alexander, *Do The Merits Matter? A Study Of Settlements In Securities Class Actions*, 43 Stan. L. Rev. 497 (1991) 3

Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. Legal Stud. 437 (1988) 3

Joseph A. Grundfest & Michael A. Perino, *Ten Things We Know and Ten Things We Don't Know About the Private Securities Litigation Reform Act of 1995*, 1015 PLI/Corp. 1015 (1997) 2

Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 Int'l Rev. L. & Econ. 3 (1990) 3

Susan P. Koniak, *Feasting While the Widow Weeps: Georgine* v. *Amchem Products, Inc.*, 80 Cornell L. Rev. 1045 (1995) 3

David Rosenberg & Steven A. Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 Int'l Rev. L. & Econ. 3 (1985) 3

Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941 (1995) 3

Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74 (1996) 2

REPLY BRIEF OF PETITIONER

In its petition, Amoco Production Company ("Amoco") demonstrated that review by this Court is necessary to clarify that *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), requires that proponents of nationwide class actions demonstrate the absence of significant conflicts of laws in order to obtain certification, and that the Oklahoma court's failure to require this demonstration violates due process of law and denies full faith and credit to the laws of the other States. Large companies such as Amoco have national operations and enter into transactions and contracts in many of the 50 states. If disputes arise from those transactions and contracts, they will typically be governed by the law of the state where the transactions transpired, the contracts were formed, or by the law selected by the parties. That is a central feature of this country's federal structure. Nationwide class-action plaintiffs like Respondent Lobo Exploration, however, misuse the class-action mechanism to ratchet-up the pressure on defendants by aggregating so many claims that even a relatively small risk of liability will provide unwarranted settlement pressure. This procedural device can effectively extinguish the substantive rights and duties of parties under different state laws, because litigation comes at too dear a price. Accordingly, the majority of courts (but not Oklahoma in the case below) have adopted a rule for class-action certification that protects the legal rights of parties and the full faith and credit to which the laws of the different States are entitled: namely, that the proponent of class-action certification bears the burden of proving that there are no conflicts of law that would destroy the predominance of common issues and render the class action hopelessly unmanageable. See Pet. 11 & n.3.

Respondent's brief in opposition attempts to obscure the Oklahoma court's central constitutional failure to vindicate the laws of other States and to protect Amoco's due process rights by quibbling over immaterial facts and misdirecting

this Court to irrelevant issues. Respondent indeed fails to mention the Oklahoma court's improper shifting of the burden of any choice of law analysis onto Amoco, largely ignores the express and varying choice of law provisions in many of the joint operating agreements at issue, misconstrues the due process norms articulated in *Shutts*, and addresses merely in a footnote this Court's recent affirmation of denial of class certification for similar reasons in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997). Allowing certification of a nationwide class action in the circumstances present here fundamentally violates due process and denies full-faith-and-credit by, in essence, forcing Amoco to sacrifice its state law rights and to face unfair litigation against an amorphous grouping of diverse plaintiffs unified only by their ability to exert tremendous settlement pressures independent of the merits of their position.

1. Respondent devotes most of its brief to arguing the merits of the choice-of-law question: namely, whether Oklahoma law should govern. See Opp. 12-15. Its arguments are incorrect, but, more fundamentally, they are irrelevant at the petition stage. This Court generally grants certiorari only to resolve conflicts in the courts of appeals or state courts of last resort or to resolve "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). There can be no question that the constitutional rights of defendants in the certification of nationwide class actions are questions of paramount importance in today's world given the significance of the certification decision—a fact which respondent does not and cannot contest.[1] Moreover, the Oklahoma Court of Appeals

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[1] *See* Joseph A. Grundfest & Michael A. Perino, *Ten Things We Know and Ten Things We Don't Know About the Private Securities Litigation Reform Act of 1995*, 1015 PLI/Corp. 1015, 1027 (1997) (quoting a study that 87.6% of securities class actions filed from April 1988 through September 1996 ended in settlement); Thomas E. Willging et al., *An*

acknowledged the significant split of authority as to which party bears the burden of proof to show conflict of law at the certification stage. See Pet. App. 6a-7a. It is critical that this Court resolve this issue to ensure that diversity in state law and the rights of parties (including the vindication of contractual choice-of-law clauses) are respected, especially given the prevalence of forum-shopping by plaintiffs in this area of law.[2]

Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 143 (1996) (noting that "certified class actions were two to five times more likely to settle than cases that contained class allegations but were never certified"); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 958 & nn.84-85 (1995) ("The certification of mass tort class actions . . . practically ensures that the litigation will be settled short of trial."); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045 (1995) (attacking collusive settlement conduct and its effects on the plaintiffs); Janet Cooper Alexander, *Do The Merits Matter? A Study Of Settlements In Securities Class Actions*, 43 Stan. L. Rev. 497, 517-17 (1991) (suggesting that class action rules result in a non-merits-based settlement regime in which securities fraud class actions typically settle for roughly between 20-27% of the amount at stake in the case); *see also, e.g.*, Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. Legal Stud. 437 (1988); Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 Int'l Rev. L. & Econ. 3 (1990); David Rosenberg & Steven A. Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 Int'l Rev. L. & Econ. 3 (1985).

[2] Respondent also devotes several pages to arguing that irrelevant factual issues were presented "in a false light" by Amoco's petition. Opp. 5, 8-9. Amoco's factual representations were entirely accurate, but they were offered principally as background to an entirely legal due process issue. For instance, Respondent contends that the 250 audits–which they concede were performed–were conducted primarily by a subset of the class and that the information provided in each audit in fact varied. *Id.* at 8-9. Amoco never stated otherwise, but the identity of which parties conducted the audits and the unquestionable reality that the disclosures made varied with the questions asked do not mitigate the Oklahoma

2. Respondent cannot refute that *Shutts* held that due process requires that a state have "significant contact[s] or . . . aggregation[s] of contacts" to the claims asserted by the class. 472 U.S. at 818. And although Respondent attacks a straw-man-argument that they need not "prove all of the possible laws that could apply," Opp. 18-19, it is part of its burden to demonstrate such contacts between the allegations and the proposed law so as to afford due process in the application of that law. See Pet. 9-11 & n.3.

The Oklahoma court simply failed to conduct the appropriate analysis of the connections between Oklahoma law with the claims asserted. Indeed, the Oklahoma courts expressly shifted the burden to demonstrate such contacts onto Amoco and thereby removed it from the proponent's burden of proof at the certification stage. Pet. App. 54a-55a. Respondent, in reference to what they deem a "most glaring misstatement[]" by Amoco , Opp. 10, does refer this Court to the Oklahoma decisions but can cite merely to an analysis of *Amoco's* contacts with the forum, not *Oklahoma's* contacts with the claims presented. Indeed, Respondent's brief omits the first sentence of the Oklahoma court's findings which make it clear that the court was analyzing "Amoco's contacts with the State of Oklahoma." Pet. App. 51a.

In *Shutts* itself, this Court expressly warned against precisely this kind of bootstrapping of a defendant's contacts (necessary for personal jurisdiction) into a due process analysis:

> The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more

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court's central failure to perform the requisite *Shutts* analysis. Indeed, these facts merely highlight the vast underlying variances in the class certified.

> difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum.

472 U.S. at 821. At no point did the Oklahoma court engage in the *Shutts* inquiry concerning connections between absent class members and Oklahoma, beyond noting that objecting absent class members may opt out. Pet App. 52a.[3]

No dispute exists that hundreds of the joint operating agreements at issue expressly designate governing law other than Oklahoma's law. Consistent with industry practice, the law selected was most often the law of the *situs* of the well and the law on which the Working-Interest Owner most likely relied in making that agreement. The Oklahoma court's conception of choice of law would apply Oklahoma law to an agreement concerning wells outside Oklahoma, owned by people outside of Oklahoma, and which expressly selects a different law, despite the demonstrated, substantive variances in the applicable law, see Pet. 14-16, nn.4-7. Choice-of-law clauses (particularly those negotiated by sophisticated commercial enterprises) should be enforced absent fraud, fundamental unfairness, violation of public policy, or unequal bargaining power, none of which is claimed here. See *Spinozzi* v. *ITT Sheraton Corp.*, 174 F.3d 842, 845-46 (7th Cir., 1999) (Posner, J.); cf., *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 593-95 (1991) (forum-selection clauses). The existence of these clauses is a significant factor in determining whether the forum state has sufficient contacts to justify uniform application of forum law in a nationwide class action, but it is wholly overlooked both in the opinion of the Oklahoma Court of Appeals and in respondent's brief in

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[3] *Compare Shutts*, 472 U.S. at 820 ("We . . . give little credence to the idea that Kansas law should apply to all claims because the plaintiffs, by failing to opt out, evidenced their desire to be bound by Kansas law.").

opposition. Indeed none of Respondent's authorities, Opp. 13 nn.37-38, are relevant because none apparently involved a choice-of-law clause.

Respondent rightly points out that commonality of law is not the only factor that may justify a class action, Opp. 16-17, but it misses the fundamental point that for nationwide class actions the prerequisites of class action certification—the *predominance* of common issues of law and fact, and the *superiority* of the class action mechanism—can only be determined by a threshold analysis to show that disparities in state law are not so extensive as to outweigh any common questions of fact or to render the class unmanageable. See *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996); *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986). Lobo's argument that a trial court could always decertify or modify the class, or create subclasses, at a *later* stage is unavailing. The fundamental point is that there generally will be no later stages of litigation; improper certification in derogation of individual due process rights and the laws of other states will often end the matter, because a defendant cannot bear the risks and cost of mass-liability litigation of this kind.

Respondent's contentions that due process does not *prohibit* the application of Oklahoma law to a nationwide class, Opp. 12-14, and its conclusion that Rule 23 does not limit the geographic scope of a class action, *id.* at 21, are likewise irrelevant to the issue of whether a trial court must analyze whether the proponent of a class has proved that a manageable class does in fact exist. Due process norms most certainly are not biased against Oklahoma law, and Amoco makes no challenge to the geographic scope of this action per se. Rather, the due process that Petitioner Amoco seeks and which *Shutts* requires is a largely procedural right to be free of the burden of litigating against an amorphous class when the proponent of class certification has been relieved of its

duty to demonstrate the absence of relevant conflicts of laws, especially when that analysis has utterly dismissed the written agreement of the parties.

3. Given the procedural nature of the claims at issue, the decision of the Oklahoma court is effectively final so that jurisdiction is proper under the seminal teachings of *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469 (1975). In *Cox*, this Court recapitulated legions of cases in which it has reviewed judgments in cases "in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or *the outcome of further proceedings preordained*." *Id.* at 479 (emphasis added). Nothing in this Court's jurisprudence has indicated that *Cox* lacks continuing vitality as the means of protecting this Court's ability to preserve rights not to be subjected to improper procedures, like the ones present here.

Due process rights like the ones at issue have traditionally been recognized as falling comfortably within the *Cox* categories. The vindication in *Shaffer* v. *Heitner*, 433 U.S. 186, 195 n.12 (1977), of a right not to be forced to defend an action on the merits when jurisdiction was grounded solely on an improper seizure of property could hardly have been accomplished if the improper trial had to be conducted in order to seek the review of this Court. Likewise, protection against undue assertions of personal jurisdiction, as in *Calder* v. *Jones*, 465 U.S. 783, 788 n.8 (1984), would be significantly diminished if one had to undergo the defective procedures in order to challenge them. See also *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 47-50 (1987) (Sixth Amendment rights); *Southland Corp.* v. *Keating*, 465 U.S. 1, 7 (1984) (arbitration preemption), *Rush* v. *Savchuck*, 444 U.S. 320, 324 (1980) (*quasi in rem* jurisdiction). The constitutional right to have legal claims adjudicated under the law of a state with sufficient contacts to the claim can only be vindicated

before having to face the pressures for settlement with a class entity that should not exist. Cf. *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 152-53 (1967) (finding administrative finality when the alternative to compliance was the risk of prosecution or civil penalties). To hold otherwise would allow an unfair procedure to dictate the substantive outcome and would require exceptional circumstances for the key issues confronting class actions to come to this Court's attention.

Numerous federal courts of appeal have recognized that the discrete issue of class certification effectively forecloses further review because of the incredible risk that a nationwide company faces regardless of the merit of the plaintiff's claims. See, *e.g.*, *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995); *Parkinson* v. *April Indus., Inc.*, 520 F.2d 650, 653-54 (2d Cir. 1975). As Judge Easterbrook recently noted, "[c]lass certifications . . . have induced judges to remake some substantive doctrine in order to render the litigation manageable. This interaction of procedure with the merits justifies an earlier appellate look." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (citation omitted). Respondents offer no answer to these concerns beyond unfounded claims about piecemeal litigation, Opp. 4, that do not reflect the realities of the effects of a class certification.

Relying primarily on the one-sentence opinion in *Gillette Co.* v. *Miner*, 459 U.S. 86 (1982) (per curiam), Respondent incorrectly asserts that this Court has dismissed petitions for want of jurisdiction in cases similar to this one. Opp. at 2. The *per curiam* decision in *Gillette* does not explain its determination within the facts of that case and does not even purport to announce any rule of law having future application. Significantly, the due process issue in *Gillette* was the rights of the non-party plaintiffs. See *Miner* v. *Gillette Co.*, 428 N.E.2d 478, 482 (Ill. 1981). Certification accordingly presented no issues of finality because the plaintiff could also

withdraw and did not face the massive pressure that often forces defendants to submit to settlements. Nothing in *Gillette* withdraws this Court's jurisdiction to review decisions that effectively determine federal issues or undermines the practical approach to finality articulated in *Cox* and its progeny.

Respondent's other authorities are likewise without force. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942) (per curiam) and *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946), stand merely for the proposition that it is the practical realities of a decision, and not the niceties of local practice, that control the finality determination. In *Pink*, this Court rejected reliance on New York practices with respect to the court with which the record was physically lodged. 317 U.S. at 268. Similarly, in *Richfield Oil Corp.*, this Court considered California rules concerning new trials, not to determine whether a decision was sufficiently final. 329 U.S. at 72-73. As this Court stated in *Market Street Railway* v. *Railroad Commission*, 324 U.S. 548, 552 (1945) with respect to finality, "[o]ur test is a practical one." See also *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974) (noting the "'practical rather than a technical construction'" of the finality requirement). Petitioner does not rely upon Oklahoma's allowance of an interlocutory review as some talisman of local practice but rather as a further legislative indication of the effective finality and unrefuted significance of the class certification decision.

This Court's decision in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), should likewise not be controlling. In *Coopers & Lybrand*, this Court rejected the "death knell" doctrine because of concerns that courts would be forced to engage in the "legislative, not . . . judicial, function" of deciding which cases merited immediate review and could allow "*indiscriminate* interlocutory review." *Id.* at 472-74.

The amendments to Fed. R. Civ. P. 23 have, however, addressed these concerns by authorizing interlocutory review of certifications in certain circumstances. These amendments have eliminated the concerns cited by this Court in rejecting the "death knell" doctrine for plaintiffs. As the Committee Notes to the new Subdivision (f) make clear, the rationale for these amendments indeed reflects the precise concerns present here:

> An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

Fed. R. Civ. P. 23(f) Advisory Comm. Notes. In light of this new federal regime as well as the similar judgment of the Oklahoma legislature that review is appropriate, fairness and conservation of judicial resources argue for consideration of constitutional certification issues even on interlocutory appeal.

Given the importance of class action certification and the conflicting authorities regarding the burden of proving manageable choice of law issues, this Court should not hesitate in asserting jurisdiction to correct the constitutionally deficient certification procedures employed in this case.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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